2007

The State of Utah v. Brandon R. Lane : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Appellee, v. BRANDON R. LANE, Defendant/Appellee, PEGGY HAY and PATRICIA HAY, Victims/Appellants.	**Case No. 20070878-SC**

BRIEF OF APPELLEE, STATE OF UTAH

Appeal from the denial of the Victims' Motion to Set Aside Plea in Abeyance and Requesting Evidentiary and Restitution Hearings and the grant of Defendant's Motion to Dismiss Plea in Abeyance to two counts of negligent homicide, class A misdemeanors, and two counts of improper passing, class C misdemeanors, in the Eighth Judicial District Court, Duchesne County, the Honorable John R. Anderson, presiding.

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BRIEF OF APPELLEE, STATE OF UTAH

JURISDICTION AND NATURE OF THE PROCEEDINGS

The Victims appeal from an order denying their motion to set aside the plea in abeyance and requesting evidentiary and restitution hearings. They also appeal from an order granting Defendant's motion to dismiss his plea in abeyance to two counts of negligent homicide, class A misdemeanors, and two counts of improper passing, class C misdemeanors. The Court of Appeals certified the case to this Court pursuant to Utah R. App. P. 43(a). R.278, 308. This Court has jurisdiction pursuant to UTAH CODE ANN. § 78a-3-102(3)(b) (West Supp. 2008).

ISSUES PRESENTED ON APPEAL AND STANDARD OF REVIEW

1. Does the Rights of Crime Victims Act apply to misdemeanor prosecutions?

2. Did the prosecutor violate the Victims' state constitutional and statutory rights by (a) misleading them about the substance of the plea agreement and the date of the plea hearing, (b) failing to fulfill her statutory duties regarding restitution; and (c) misrepresenting to the trial court that the Victims agreed with the terms of the plea agreement?

3. Assuming that the Victim's rights were violated, can they obtain a misplea, or otherwise vacate Defendant's plea, based on a violation of their rights?

Standard of Review for Issues 1-3. The foregoing issues involve interpretation of state statutes and a constitutional provision and thus present questions of law, reviewed for correctness. *See State v. Casey*, 2002 UT 29, ¶ 19, 44 P.3d 756.

4. If a victim may not obtain a misplea, may the State nevertheless move for and obtain a misplea if it is established that the prosecutor committed a fraud on the trial court that led to its acceptance of the plea in abeyance?

No standard of review applies to this issue.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following state constitutional provision, statutes, and court rule, whose full text is reproduced in Addendum A, are relevant to the resolution of this case:

UTAH CONST. art. I, § 28 (Victims' Rights Amendment);

UTAH CODE ANN. § 76-3-201 (West Supp. 2008) (Sentencing);

UTAH CODE ANN. §§ 77-2a-1 to -4 (West Supp. 2008) (Pleas in Abeyance);

UTAH CODE ANN. §§ 77-37-1 to –5 (West Supp. 2008) (Victims' Rights Act);

UTAH CODE ANN. §§ 77-38-1 to –14 (West Supp. 2008) (Rights of Crime Victims Act);

UTAH CODE ANN. §§ 77-38a-101 to –601 (West Supp. 2008) (Crime Victims Restitution Act);

Utah R. Crim. P. 35 (Victims and Witnesses).

STATEMENT OF THE CASE

Defendant's Plea in Abeyance Agreement

In July 2005, the State charged Defendant with two counts of negligent homicide, class A misdemeanors, based on a February 2005, auto accident. R.6-7. On 12 September 2005, Defendant pled guilty pursuant to a plea in abeyance agreement. R.15-19[1], 19b-21 (a copy of the plea in abeyance agreement is attached as **Addendum D** and a copy of the order accepting the agreement is attached as **Addendum E**).

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[1] There is a clerical error in the pagination of the record. The Plea in Abeyance Agreement bears page numbers 15-18; the minute entry of the plea hearing bears page numbers 15-19.

The agreement required Defendant to plead guilty to two counts of negligent homicide, class A misdemeanors, in violation of UTAH CODE ANN. § 76-5-206, and two counts of improper passing, class C misdemeanors, in violation of UTAH CODE ANN. § 41-6a-706(1) and (2). R.16, 19b-20. These pleas would be held in abeyance for twelve months. R.16, 19b-20.

The agreement also provided that defendant would pay $1,500 "for the benefit of the victims' families[,]" complete a driving awareness course of at least eight hours, perform forty hours of community service, violate no law other than non-moving traffic violations, and appear before the court whenever required. R.18. The agreement specified that the State "will not bring any other charges or actions for restitution against Defendant for . . . events related to [the] automobile accident." R.16.

At the plea hearing, the prosecutor, Ms. Karen Allen, and defense counsel, Mr. Robert Faust, explained the terms of the agreement to the trial court. R.231:2-5 (a copy of the transcript is attached as **Addendum F**). Although the prepared agreement specified that Defendant would pay $1,500 in restitution, the prosecutor told the trial court that she didn't seen any value in Defendant paying that amount "at this point." R.231:3. She explained that she wanted the court to address restitution separately because the Victims had incurred excessive medical bills, "over a million dollars right now" on one of the victims, and the

issue of how much the insurance companies were going to pay was still unresolved. R.231:3. The prosecutor asked the court to "leave the damage issue open." R.231:4.

The trial court then asked if Defendant had liability insurance. R.231:4. Defense counsel responded that Defendant had a $50,000 policy that had "all been paid out" and that no additional funds were available. R.231:4. He also explained that Defendant's wife, who was also injured in the accident, had waived her right to any insurance proceeds and that the $1,500 was "what we were able to come up with in regards to what they could fit . . . within their budget." R.231:4.

The prosecutor explained that she believed the Victims would consider a $1,500 payment as "a slap in the face." R.231:4. The trial court then asked whether the case was actually settled. R.231:4. The prosecutor responded that "we are settled, but I guess I'm just saying I don't know why he needs to pay $1,500." R.231:5.

In response, the trial court suggested that the $1,500 could be paid as a "plea in abeyance fee . . . toward the Judge's retirement fund[,]" and asked, "Would that make the family feel better?" R.231:5. Defense counsel then suggested that the court interlineate the agreement to specify where the funds

were to go. R.231:5. The trial court interlineated the order accepting the plea in abeyance to specify that the $1,500 would be paid as a "PIA fee."[2] R.20.

During the plea colloquy, the prosecutor volunteered to the court that she had gone to Denver before the plea hearing and met with the Victims. R.231:8. The prosecutor stated that the Victims "had a lot of concerns at first, but I think that they are good with the agreement." R.231:8. The Victims were not present at the plea hearing, nor did they appear through counsel. R.231:1-11.

The Victims' Allegations[3]

After listening to an audio recording of the plea hearing, the Victims believed that the prosecutor had misrepresented to them the substance of the plea agreement, and had misrepresented to the trial court their opinion of the agreement. R.51-58, 190-97. The Victims allege that the prosecutor met with them on 31 August 2005 to discuss the plea agreement. R.53, 192. They claim that the prosecutor told them that she was considering allowing Defendant to plead guilty to both counts of negligent homicide, and holding the plea to one of those counts in abeyance for three years, but sentencing him on the other. R.54, 193. They also claim that they told the prosecutor that they wanted a restitution order because they did not want to be forced to sue Defendant civilly. R. 56, 195.

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[2] The acronym presumably stands for "Plea In Abeyance."

[3] Because no evidentiary hearing was held below, the Victims' version of events is taken from their affidavits filed in support of their motions.

The Victims claim that the prosecutor told them to organize their expense records and send them to her office because they would be relevant at sentencing. R.56, 195.

The prosecutor allegedly told the Victims that a sentencing hearing would probably be held in January where they could appear and address the court. R.56, 194-95. According to the Victims, the prosecutor told them that the 12 September 2005 hearing was just a status hearing and that the plea hearing would likely be held on 26 September 2005. R.55, 194.

The Victims also allege that documents in the prosecutor's file demonstrate that she had already agreed to settle the case before she met with them. R.57-58, 196. A letter from Defendant's counsel, dated 15 August 2005, allegedly appears in the prosecutor's file. R.57-58, 196. (A copy of the letter, with attachments, is included in the record at R.94-99). In this letter, defense counsel thanks the prosecutor for resolving the case, states that he plans to see the prosecutor on 12 September 2005 "to conclude this matter," and attaches a copy of the same plea in abeyance agreement accepted by the court. R.57-58, 196.

Proceedings on the Victims' Motions

On 27 January 2006, the Victims, through counsel, filed a motion for a restitution hearing. R.24. On 3 August 2006, the Victims filed a "Motion To Set Aside Plea In Abeyance And For Evidentiary Hearing." R.35-39. On 14 August

2006, the trial court entered an order staying the plea in abeyance period pending resolution of the Victims' motions. R.45.

The State did not respond to either of the Victims' motions. R.204. After receiving both the Victims' and Defendant's memoranda, the trial court entered a ruling and order denying the motions. R.204-05 (a copy of the ruling is attached as **Addendum B**).

The Victims timely appealed from this order. R.219. Pursuant to the Victims' request, the trial court agreed to extend the stay of the plea in abeyance period until the appeal was resolved. R.212, 217.

Although the trial court denied the Victims' motion, it stated that it would "schedule a hearing at which, should the victims desire, victim impact statements may be presented." R.205-06. The court intended the hearing as "an attempt to provide the victims with the fairness, respect, and dignity contemplated by the Utah Constitution." R.205. In a later telephonic conference to schedule this hearing, the court noted that it had already "ruled definitively on the issue of the plea." R.212. The victim impact hearing was held 5 November 2007. R.305-06.

Defendant's Motion To Dismiss

While the Victims' appeal was pending, Defendant filed in the trial court a "Motion To Dismiss Plea In Abeyance of Defendant Pursuant to U.C.A.77-2a[-]2

(5)." R.232-39. The trial court granted Defendant's motion, allowed Defendant to withdraw his guilty pleas, and dismissed the case with prejudice. R.300-02 (a copy of this Order is attached as **Addendum C**, a copy of the transcript from the hearing on the motion is attached as **Addendum G**).

The Victims also timely appealed from this order. R313. The Court of Appeals certified both appeals to this Court. R.278, 308. This Court consolidated the appeals into this case. R.311-12.

STATEMENT OF THE FACTS

A Deadly Decision

On a wet and foggy February morning in 2005, brothers Dan and John Hay were traveling home to Colorado with their wives Peggy and Patricia. R.3, 17, 52. The four were in a Jeep traveling eastbound on Highway 40 near Duchesne. R.3, 17. Dan and John were in the front seat; Peggy and Patricia were in the back. R.3, 17, 51-52, 190-91.

Defendant was traveling westbound on the same two-lane highway. R.3, 17, 199. He was driving a Ford F-250 Super-Duty diesel pick-up truck. R.3, 17. One witness recalled that defendant passed her vehicle "at an excessive[ly] high speed." R.199. Ahead were several other vehicles, all traveling behind a semi tanker truck that was pulling a pup trailer. R.3, 17. Defendant passed each of the other vehicles until he reached the semi. R.199. He then pulled into the

oncoming traffic lane and began accelerating past the semi's pup trailer. R.3, 17, 199. Defendant failed to see the Hay's Jeep until it was too late. R.3, 17, 51-52, 199.

Recognizing that a head-on collision was imminent, and being blocked on the right by the semi, defendant swerved to the south shoulder. R.3, 17. The Hays also swerved south. R.3, 17. Defendant's truck slammed into the Hay's Jeep head on. R.3, 17. Both vehicles came to rest in a ditch near a sign reading "Passing Lane 500 Ft." R.199.

The Victims

Patricia and Peggy were severely injured and hanging upside down from their seatbelts. R.52, 191, 199. It took over a half an hour for emergency crews to arrive and begin extracting them. R.52. Peggy was unconscious for at least part of that time. R.199. Patricia waited in anguish, wondering if her husband survived. R.52. He did not. R.3, 202. Both Dan and John were killed instantly. R.3, 202.

Peggy suffered life-threatening injuries and was in a coma for at least ten days. R.191. She suffered cardiac arrest, kidney failure, multiple broken bones, and a ruptured aorta, spleen, and diaphragm. R.191. She has endured ten major surgeries. R.191. Patricia suffered lacerations to her head, severe bodily trauma, and four broken bones in her arm. R.52.

Dan and Peggy had been married forty-two years. R.190. In addition to his wife, Dan is survived by two daughters, three grandchildren, and two step grandchildren. R.190. John and Patricia had been married thirty-nine years. R.51. John is survived by three children and five grandchildren. R.51. He had retired in January, 2005, one month before the accident. R.51.

SUMMARY OF ARGUMENT

1. The Rights of Crime Victims Act applies to misdemeanor prosecutions. Although the Act is ambiguous, a harmonious reading of its relevant provisions, together with the legislative history of the 1997 amendment, clarify that the amendment was intended to extend the Act to misdemeanor prosecutions.

2. If the Victims' allegations are true, then their rights were violated. The prosecutor allegedly misled them about the substance of the plea agreement, mislead them about their rights to be present and heard in court, and failed to secure for them any court-ordered restitution.

3. The Victims cannot obtain any substantive remedy for these violations. As harsh as that conclusion appears, it is the most reasonable interpretation of the relevant law. The constitutional and statutory provisions governing victims' rights specifically prohibit the Victims from obtaining the remedies that they seek. Additionally, these provisions allow a victim to challenge only court orders directed toward her (such as denial of her right to be heard). A victim

may not challenge a court's orders directed toward the defendant (such as acceptance of a plea). Victims are limited to the remedies provided by statute because the Victims Rights' Amendment is not self-executing. Sound policy also favors this limitation on victims' remedies because victims are not parties to a criminal case.

4. However, this case involves more than the prosecutor's violation of the Victims' rights. If the Victims' allegations are true, then the prosecutor committed a fraud on the trial court by misrepresenting the Victims' position on the plea. Such malfeasance must be addressed by granting a misplea.

Although the Victims' cannot move for a misplea, the State can. Therefore, this Court should remand this case for an evidentiary hearing to determine if the prosecutor committed a fraud on the trial court. If she did, then the State would move for a misplea.

ARGUMENT

I. THE RIGHTS OF CRIME VICTIMS ACT APPLIES TO CLASS A MISDEMEANORS

The trial court denied the Victims' motion to set aside the plea in abeyance on the ground that the Victims' constitutional and statutory rights were not violated because the Rights of Crime Victims Act did not apply to a misdemeanor prosecution. R.205 (Add. B). The Victims contend that a 1997 amendment extended the Act, except for its notice provisions, to cases involving

class A and B misdemeanors. Br. Aplt. at 20-30. The Victims argue that the Act is ambiguous, but that interpretation of its relevant provisions and reference to the legislative history of the 1997 amendment resolves the ambiguity. Br. Aplt. at 20-30. The State agrees.

A. The plain language of the Act is ambiguous.

This Court's "'primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve.'" *State v. Holm*, 2006 UT 31, ¶ 16, 137 P.3d 726 (quoting *Foutz v. City of S. Jordan*, 2004 UT 75, ¶ 11, 100 P.3d 1171). This Court will "'read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters.'" *Id.* (quoting *Miller v. Weaver*, 2003 UT 12, ¶ 17, 66 P.3d 592). This Court will "look to other interpretive tools such as legislative history" only if it finds that a statute is ambiguous. *Id.* (citing *Adams v. Swensen*, 2005 UT 8, ¶ 8, 108 P.3d 725).

The Utah Constitution sets forth crime victims' general rights. UTAH CONST. art I, § 28. The relevant section states that it "shall extend to all felony crimes and such other crimes or acts . . . as the Legislature may provide." *Id.* at § 28(3). That section also states that "[t]he Legislature shall have the power to enforce and define this section by statute." *Id.* at § 28(4).

The Rights of Crime Victims Act defines the general rights enumerated in the State Constitution. UTAH CODE ANN. §§ 77-38-1 to –14 (West Supp. 2008).[4] As originally enacted in 1994, the Act applied "to all felonies filed in the courts of the state of Utah and, if specifically provided, to cases in the juvenile court." § 77-38-5 (1994). It provided, among other rights, that victims may be present or heard (and often both) at the "important criminal justice hearings" specified in the Act. § 77-38-4(1) (1994). It also required the prosecutor to notify victims of "important criminal justice hearings." § 77-38-3(3) (1994). It defined the term "important criminal justice hearings" as "the following proceedings in *felony* criminal cases" and listed various court hearings. § 77-38-2(3) (1994) (emphasis added).

A 1997 amendment to section 77-38-5 extended the Act "to any class A and class B misdemeanor." 1997 Laws of Utah ch. 103, § 3. However, the amendment specifically excluded misdemeanor cases from the Act's notice requirements, *id.* at § 2, presumably to avoid overburdening prosecutors with requiring notice to victims in the myriad of misdemeanor cases filed each year.

The amendment created an ambiguity within the statute. Although it explicitly extended the Act to Class A and B misdemeanors, it did not amend the definition of "important criminal justice hearings" in section 77-38-2(5) to include

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[4] Unless otherwise specified, all statutory citations are to the West Supplement for 2008.

misdemeanor hearings. *Id.* at § 1. Thus, under the amended version of the Act, which is the version at issue here, section 77-38-5 extends the Act to class A and B misdemeanors, and section 77-38-4(1) specifies that victims have the right to be present or heard at various "important criminal or juvenile justice hearings," but section 77-38-2(5) defines those "important . . . hearings" as those held only "in felony criminal cases." UTAH CODE ANN. §§ 77-38-2(5), -4(1), -5.

This Court can resolve this ambiguity by interpreting the Act as a whole, and consulting the legislative history of the 1997 amendment. *See Holm*, 2006 UT 31, ¶ 16 (noting that this Court interprets statutes as a whole and will consult legislative history to resolve statutory ambiguities).

B. Reference to the Act's other relevant provisions and legislative history resolve the ambiguity.

Reading the Act as a whole demonstrates that the Legislature intended the 1997 amendment to extend the Act to class A and B misdemeanors. The Victims correctly observe that the "carve out" provision of the amendment that excepted misdemeanors from the Act's notice requirements were unnecessary if the Legislature had intended that the Act apply only to felonies. Br. Aplt. at 22-23.

The Victims also correctly observe that the legislative history of the 1997 amendment demonstrates that it was intended to extend the Act to misdemeanors. Br. Aplt. at 24-26. The portions of the floor debates quoted in the Victims' brief resolve any doubt about the scope of the Act. Br. Aplt. at 24-26.

Given the Act's ambiguity, the district court's ruling that the Act did not apply in this misdemeanor case was understandable. However, the State agrees with the Victims that this ruling was incorrect. This Court should hold that the Act applies to cases in which class A or B misdemeanor charges are filed. *See* UTAH CODE ANN. § 77-38-5(2).

II. THE PROSECUTOR VIOLATED THE VICTIMS' RIGHTS

The Victims allege that the prosecutor violated their state constitutional rights "to be treated with fairness, respect and dignity." Br. Aplt. at 30-39. They claim that the prosecutor did so in three specific ways by "fail[ing] to follow legal obligations regarding victims' rights." Br. Aplt. at 33.

First, the Victims argue that the Victims Rights Act required the prosecutor to "inform[] and assist" them and to provide them with "clear explanations regarding relevant legal proceedings." Br. Aplt. at 31, 34-36; UTAH CODE ANN. § 77-37-3(b) and (c). They also assert that rule 35(e) of the Utah Rules of Criminal Procedure required the prosecutor to inform them about the substance of the plea agreement. Br. Aplt. at 36-37. The Victims claim that the prosecutor violated these statutory provisions and rule by misinforming them about the substance of the plea agreement and the date of the plea hearing. Br. Aplt. at 31, 34-37.

Second, the Victims claim that under *State v. Casey*, 2002 UT 29, ¶ 32, 44 P.3d 756, a prosecutor has a duty as an officer of the court to convey to the court a victim's request to be heard. Br. Aplt. at 37-38. *Casey* interpreted both the Victims' Rights Act, UTAH CODE ANN. § 77-37-3(1)(c), and the Rights of Crime Victims Act, UTAH CODE ANN. § 77-38-4(1), to require prosecutors to "convey requests to be heard." *Id.* at ¶¶27-32. In addition to the prosecutor's statutory duties, this Court also held that "as an officer of the court, a prosecutor must convey a victims' request to be heard at a change of plea hearing." *Id.* at ¶ 33. The Victims claim that the prosecutor violated this duty by failing to tell the trial court that she had misinformed them about the substance of the plea agreement and by misrepresenting to the trial court that the Victims were satisfied with the terms of the plea agreement. Br. Aplt. at 37-38.

Finally, the Victims contend that under the Crime Victims Restitution Act, the prosecutor was required at the plea hearing to provide the trial court with "the names of all victims asserting claims for restitution and the actual or estimated amount of restitution." Br. Aplt. at 38 (citing UTAH CODE ANN. § 77-38a-202(1)(a). The Victims contend that the prosecutor failed to do so.

This Court has emphasized that prosecutors "have an obligation to ensure that the constitutional rights of crime victims are honored and protected." *Casey*, 2002 UT 29 at ¶¶ 32-37. In addition to the responsibilities incumbent upon all

officers of the court, a prosecutor possesses additional "unique responsibilities" with respect to victims because of her position as a "minister of justice." *Id.* at ¶ 32. Thus, this Court has held that a prosecutor violates a victim's rights when she fails to (1) assist the victim in exercising her right to be heard, (2) provide the victim with a clear explanation of the events transpiring at a change of plea hearing, and (3) inform the court of the victim's desire to be heard. *See id.* at ¶¶ 35, 37.

In this case, the State agrees with the Victims that, if the allegations in their affidavits are true, then the prosecutor violated their statutory rights.

III. THE VICTIMS CANNOT OBTAIN A MISPLEA, SET ASIDE THE PLEA IN ABEYANCE AGREEMENT, OR OTHERWISE REOPEN THIS CASE

Although the State agrees that the Victims' rights were violated, the State does not agree that the Victims are entitled to the remedies that they seek, or any other remedy that would reopen this case. The Victims ask this Court to either "declare a misplea" or "set aside the plea in abeyance." Br. Aplt. at 62, 75. The Victims also ask this Court to direct that once a subsequent conviction is obtained, the trial court should "conduct a full evidentiary restitution hearing." Br. Aplt. at 62, 75. However, both the Utah Constitution and the Rights of Crime Victims Act specifically prohibit the Victims from obtaining these remedies. Additionally, the statutory scheme governing victims' rights allows victims to

challenge only orders that affect them directly. Victims are limited to the remedies provided by statute because the provisions of the Victims Rights' Amendment are not self-executing. Sound policy also favors this limitation on victims' rights because victims are not parties to a criminal case.

A. Both the Victims' Rights Amendment and the Rights Of Crime Victims Act prohibit the remedies that the victims seek.

The Victims claim that the "straightforward remedy" for violation of their right "to be treated with fairness, dignity and respect and to be heard at a plea hearing is . . . a declaration of a 'misplea.'" Br. Aplt. at 63. However, both constitutional and statutory provisions prohibit this remedy.

The Victims' Rights Amendment to the Utah Constitution declares that "[n]othing in this section shall be construed as creating a cause of action for money damages, costs, or attorney's fees, or for dismissing any criminal charge, or relief from any criminal judgment." UTAH CONST. art. I, § 28.

Similarly, the Amendment's implementing legislation, the Rights of Crime Victims Act, states that "[t]his chapter may not be construed as creating a basis for dismissing any criminal charge or delinquency petition, vacating any adjudication or conviction, admission[,] or plea of guilty or no contest, or for appellate, habeas corpus, [sic] or other relief from a judgment in any criminal or delinquency case." UTAH CODE ANN. § 77-38-12(2).

These provisions prohibit a misplea based on the Victims' motion because a misplea would amount to relief from a criminal judgment. *See* UTAH CONST. art. I, § 28(2); UTAH CODE ANN. § 77-38-12(2). A misplea could not be granted without first reopening the judgment dismissing this case with prejudice. Granting a misplea would also vacate defendant's guilty pleas, in violation of section 77-38-12(2).

Nor can the Victims obtain their alternative proposed remedy: an order "set[ting] aside just the agreement holding the plea in abeyance and let[ting] the guilty plea stand (if the defendant so chooses)." Br. Aplt. at 66. While this result would arguably not "vacate" defendant's guilty plea, it would nevertheless amount to "relief from a criminal judgment" because it would reopen this case that has been dismissed with prejudice.

The Victims' request for a restitution hearing fails for the same reason. As the Victims' recognize, a restitution hearing would only be possible if this case were reopened and either a misplea granted or the plea in abeyance agreement set aside. Br. Aplt. at 62. Therefore, a restitution hearing is not possible without relief from the judgment in this case.

Nothing in the Victims' Rights Amendment or section 77-38-12(2) indicates that these provisions were intended to prevent only defendants from seeking relief based on a violation of a victim's rights. These provisions contain no

words of limitation that would prevent their application here. This Court will "look beyond the plain language only if [it] find[s] some ambiguity." *State v. Burns*, 2000 UT 56, ¶ 25, 4 P.3d 795. The Victims allege no ambiguity in these provisions, and the State perceives none. In fact, the Victims ignore these provisions.

An earlier section demonstrates that the Legislature was capable of drafting a provision applying only to defendants. Section 77-37-5(5), found in the preceding chapter, containing the "Victims' Bill of Rights," states: "[t]he person accused of and subject to prosecution for the crime . . . has no standing to make a claim concerning any violation of the provisions of this chapter." Had the Legislature similarly intended to limit the effect of section 77-38-12(2) to defendants, it would have done so.

The Victims seek relief that is prohibited by both state constitutional provision and statute. Therefore, their claims fail.

B. The constitutional and statutory provisions governing victims' rights allow victims to challenge only court action that affects them directly.

If these prohibitions on available remedies were not sufficiently clear, the structure of the statutory scheme governing victims' rights demonstrates that the Victims cannot obtain the remedies that they seek. The structure and language of the Rights of Crime Victims Act allow victims to challenge only court action

that affects them directly. Those provisions make clear that, while a victim may challenge a court's orders directed toward her (such as denial of her right to be heard), she may not challenge a court's orders directed toward the defendant (such as acceptance of a plea).

The Act specifies how the rights of victims are to be enforced. Specifically, "the enforcement mechanism is an action for a court order requiring a criminal justice agency to comply with the rights contained in the Victims' Rights Amendment and the Rights of Crime Victims Act." Paul G. Cassell, *Balancing the Scales of Justice: The Case for and the Effects of Utah's Victims' Rights Amendment*, 1994 Utah L. Rev. 1373, 1419.

"The Act provides for two kinds of suits." *Id.* One is "an action for injunctive relief," § 77-38-11(1), the other is "an action for declaratory relief or for a writ of mandamus defining or enforcing the rights of victims and the obligations of government entities under this chapter." § 77-38-11(2)(a)(i).

The Act also provides that "[a]dverse rulings on these actions or on a motion or request brought by a victim of a crime or a representative of a victim of a crime may be appealed under the rules governing appellate actions, provided that no appeal shall constitute grounds for delaying any criminal or juvenile proceeding." § 77-38-11(2)(b). Thus, while a victim may challenge on appeal a court's actions affecting her directly (such as the right to be heard), she

may not challenge actions directly affecting the State or defendant (such as acceptance of a plea).

This conclusion is apparent from this subsection's proviso protecting defendants' speedy trial rights. Since "[a]ll of the rights contained in [the Act] shall be construed to conform to the Constitution of the United States," § 77-38-12(4), the victim's right to be heard is necessarily subordinate to the defendant's right to a speedy trial. Thus, under the Act, "no appeal shall constitute grounds for delaying any criminal or juvenile proceeding." § 77-38-11(2)(b).

Ordinary pretrial delays may create a window for a victim to "bring an action for declaratory relief or for a writ of mandamus . . . enforcing the rights of victims." § 77-38-11(2)(a)(i). However, where, as here, no such window exists, the criminal proceeding will go forward.

This proviso would make no sense if victims had standing to challenge the court's actions with respect to defendants, such as accepting a guilty plea or imposing sentence. However, it makes perfect sense if a victim is permitted to seek only clarification of his own right to be present or heard.

Of course, allowing the criminal action to progress will ordinarily moot the victim's appellate challenge. However, the Legislature anticipated and provided for this very eventuality: "[a]n appellate court shall review all such properly

presented issues, including issues that are capable of repetition but would otherwise evade review." § 77-38-11(2)(c).

In other words, although the criminal action is proceeding and may in fact have concluded below—otherwise rendering the victim's appeal moot—the appellate court should nonetheless address it in the interest of public policy.

The language of the Victims' Rights Amendment and the Act provides further support for the conclusion that a victim may challenge only court action that directly affects her. As discussed, subsection (2) of the Amendment states that its provisions may not be the basis "for dismissing any criminal charge, or relief from any criminal judgment." UTAH CONST., art. 1, § 28(2). Likewise, section 77-38-12(2) plainly forbids vacating a guilty plea or obtaining any other "relief from a judgment" based on a violation of the Act. § 77-38-12(2).

"'One of the cardinal principles of statutory construction is that the courts will look to the reason, spirit, and sense of the legislation, as indicated by the entire context and subject matter of the statute dealing with the subject.'" *Mountain States Tel. & Tel. Co. v. Payne*, 782 P.2d 464, 466 (Utah 1989) (quoting *Masich v. U.S. Smelting, Ref. & Mining Co.*, 113 Utah 101, 108, 191 P.2d 612, 616 (1948)).

The sense of this legislation is apparent. Where the trial court denies a victim's motion or request for notice, to be present, heard, or to exercise any

other enumerated right, the victim may appeal. The criminal proceeding, however, progresses, and subsequent guilty pleas and convictions remain intact. The appellate court must hear the victim's appeal even if the progression of the criminal case below has rendered it technically moot. However, a victim cannot use a violation of the Amendment or the Act as the basis for vacating a plea or sentence, or any other court action that directly affects the defendant.

1. Justice Wilkins' concurring opinion in *Casey* foresaw that the Act could leave victims with rights but no remedies.

In his concurring opinion in *Casey*, Justice Wilkins foresaw that the Rights of Crime Victims Act could place victims in the very plight in which the Victims in this case now find themselves—having rights but no remedies. *See* 2002 UT 29 at ¶¶47-49 (Wilkins, J., concurring). A prosecutor or trial court may deny a victim her right to be present or heard at a plea hearing and the victim may appeal the denial of that right. However, because a criminal proceeding moves forward under section 77-38-11(2)(b) while that appeal is pending, Justice Wilkins recognized that "the victim has little hope of a meaningful remedy." *Id.* at ¶ 47. He observed that this Court's "hands are tied by the same constitutional and statutory provisions that [give victims their] right to be heard in the first place." *Id.* at ¶ 48. "[I]n practice, the right of a victim to be heard at a change of plea hearing is fragile at best, and may be made illusory by the intentional or

unintentional mishandling of the situation by the prosecutor or the trial court, all without meaningful remedy." *Id.* at ¶ 49. Although Justice Wilkins suggested that the Legislature reconsider the statute, *see id.*, it has not yet done so.

2. Other jurisdictions reach this same conclusion.

Other courts have reached this same conclusion under their jurisdictions' victims' rights legislation. For example, in *Ex Parte Littlefield*, 540 S.E.2d 81 (S.C. 2000), the South Carolina Supreme Court held that "[t]he trial court cannot use the Victims' Bill of Rights to re-open a completed criminal proceeding. Further, even if the [prosecutor] fails to honor the Victims' Bill of Rights during a criminal proceeding, this Court cannot issue a writ of mandamus to re-open a criminal proceeding once it is resolved." *Id.* at 85. The Court concluded, "[a] writ of mandamus under the Victims' Bill of Rights is reserved to enforce its provisions, not to re-open a case when a victim is unhappy with its outcome." *Id.* at 87.

Similarly, in *State ex rel. Goldesberry v. Taylor*, 233 S.W.3d 796, 797, 799 (Mo. App. 2007), the Missouri Court of Appeals rejected the State's motion to set aside a conviction and sentence on the grounds that the victim was not given the opportunity to be heard at the plea hearing. The court held that "whatever special accommodations may be afforded to the victims under the victims' rights provisions, such provisions contain no authorization for a court to set aside a guilty plea." *Id.* at 799.

Amicus cites *People v. Stringham*, 206 Cal.App.3d 184 (Cal. App. 1988), as an example of a case "allowing [a] trial court to set aside a plea based on crime victims' objections." Amicus Br. at 11 n.6. However, *Stringham* is distinguishable because the trial court never formally accepted Stringham's guilty plea prior to setting it aside. 206 Cal. App. 3d at 189, 195. Thus, *Stringham* simply establishes that a trial court can rescind its conditional acceptance of a plea before sentencing. *Id.* at 193-97.

C. Victims are limited to statutorily provided remedies because the Victims' Rights Amendment is not self-executing.

The Victims seem to presume that the Victims' Rights Amendment is self-executing and therefore they can seek whatever remedy they deem necessary to vindicate their right to be treated "with fairness, respect, and dignity." Br. Aplt. at 30-39, 51-68. However, the Amendment is not self-executing. Therefore, the Victims are limited to the remedies provided by the legislation defining and enforcing their state constitutional rights.

"[A] self-executing constitutional clause is one that can be judicially enforced without implementing legislation." *Spackman v. Bd. of Educ.*, 2000 UT 87, ¶ 7, 16 P.3d 533. "'[C]ourts may give effect to a provision without implementing legislation if the framers intended the provision to have immediate effect and if no ancillary legislation is necessary to the enjoyment of a right given.'" *Id.* (quoting *Bott v. DeLand*, 922 P.2d 732, 737 (Utah 1996)).

Conversely, provisions that "merely indicate a general principle or line of policy without supplying the means for putting them into effect" are not self-executing. *Id.*

Under this standard, the provisions in the Victims' Rights Amendment are not self-executing. The Amendment states general principles and policies as opposed to specific directives. *See* UTAH CONST. art. 1, § 28. The Amendment explicitly states that victims rights are "defined by law," not by the language of the Amendment itself. *Id.* at § 28(1). It also explicitly requires that the Legislature draft legislation implementing its provisions. *Id.* at § 28(4). The Amendment looks to the Legislature "to enforce and define this section by statute." *Id.*

Because the rights in the Victims' Rights Amendment are not self-executing, victims are limited to the remedies provided in the implementing legislation. If a right "is not a common-law right, but is one created by statute," then "the law creating the right can also prescribe the conditions of its enforcement." *State Farm Mut. Auto. Ins. Co. v. Clyde*, 920 P.2d 1183, 1185 (Utah 1996) (citing *Parmley v. Pleasant Valley Coal Co.*, 228 P. 557, 560 (Utah 1924)). Crime victims' rights are a creature of recent legislation, not the common law. *See State v. Casey*, 2002 UT 29, ¶ 18 n.6, 44 P.3d 756 (recognizing that Utah's victims' rights legislation was a reaction to the victims' rights movement of the

early 1970's). Therefore, the legislation defining victims rights also provides the exclusive remedies for a violation of those rights.[5] *See Clyde*, 920 P.2d at 1185.

D. Sound policy reasons support the conclusion that victims cannot challenge court action that directly affects the parties.

Sound policy justifies limiting victims' ability to challenge court action to only those actions that directly affect them, not the parties. First, victims are not parties to a criminal case. The criminal justice system was specifically designed to make the community, not the victim, the prosecuting entity. Second, allowing victims to challenge actions affecting the parties would create a significant potential for defendants to exploit the remedy.

1. The Act properly limits victims' remedies because victims are not parties.

The Act properly limits a victim's ability to challenge orders that do not affect her directly because a victim is not a party to a criminal case. As a non-party, a victim cannot challenge court action that directly affects the parties.

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[5] The Victims' Open Courts challenge, *see* Br. Aplt. at 72-74 (citing UTAH CONST., art. I, § 11), fails for the same reason. The Open Courts Clause "is not an absolute guarantee of all substantive rights." *See Tindley v. Salt Lake City School Dist.*, 2005 UT 30, ¶ 17, 116 P.3d 295. Rather, the Clause applies only to legislation that limits or abrogates remedies that existed when the Clause was enacted. *See id.* (recognizing that the Clause "applies only to legislation which 'abrogates a cause of action existing at the time of its enactment.'") (citing *Laney v. Fairview City*, 2002 UT 79, ¶ 50, 57 P.3d 1007). Because victims' rights were not recognized when the Open Courts Clause was enacted, the Clause is not applicable. *See id.*

Although a victim may have an interest in the outcome of a criminal case, she is not a party to that case. *See State v. Harrison*, 2001 UT 33, ¶30, 24 P.3d 936. In *Harrison*, this Court considered the extent to which a minor victim of sexual abuse could participate, through her guardian ad litem, in the criminal trial of her abuser. *Id.* at ¶¶ 28-33. In holding that it was error to allow the guardian ad litem to sit at counsel table and question witnesses, this Court observed that "[t]he interests of a child victim are not always the same as the interests of the parties to a criminal case: the defendant and the State." *Id.* at ¶ 30. Therefore, this Court concluded that a victim is not "an interested party." *Id; see also, State v. Lamberton,* 899 P.2d 939, 941 (Ariz. 1995) (en banc) (although victims have "right to be heard at 'criminal proceedings,' we cannot conclude that victims are 'parties' with the right to file their own petitions for review"). Professor Beloof dubs victims "participants." Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model,* 1999 Utah L. Rev. 289, 290.

In *Cooper v. District Court*, 133 P.3d 692 (2006), the Alaska Court of Appeals considered the extent to which a victim may participate in a criminal proceeding. The victim in *Cooper* claimed that Alaska's victims' rights legislation allowed her to bring an original action for relief claiming that the district court erred in sentencing the defendant. *Id.* at 694. The court dismissed the petition, holding that "[t]he right to challenge the sentencing decision rests solely with the parties

to this criminal prosecution—the plaintiff, Municipality of Anchorage, and the defendant, Daniel Cooper." *Id.* at 719. In reaching this holding, the court noted that "courts from other states are unanimous in holding that a crime victim does not have the right to participate as an independent party in a criminal case." *Id.* at 696, 701-705 (collecting cases).

Because victims are not parties, the laws governing their rights properly prevent them from challenging court action that directly affects the parties, even though that action may also affect them. This Court recognized this principle in *Harrison* when it held that a guardian ad litem's participation in a criminal case "would be peripheral, and strictly limited to matters relating specifically to the treatment of the child victim, such as assuring that the victim received notice and opportunity to be present and heard as mandated by the victims' rights statutes." 2001 UT 33, ¶ 28. Likewise, the Alaska Court of Appeals concluded in *Cooper* that although there will be times when a crime victim is dissatisfied with a case's outcome, "we, as a society, have decided that it is fairer to let public officials make these decisions, rather than putting the victim in charge of making these decisions, or letting the victim second-guess or veto these decisions." 133 P.3d at 711.

2. Allowing victims to challenge convictions based on plea agreements would create a significant potential to abuse the remedy.

Allowing victims to challenge a guilty plea will create a significant potential for dishonest defendants or victims to exploit the remedy by making false claims. A defendant who had second thoughts about his plea could exploit this remedy by manipulating his victim into falsely claiming that the prosecutor violated her rights during the plea bargaining process. The danger of such manipulation is greatest in domestic violence cases, which involve particularly vulnerable victims. Given this potential for abuse, sound policy supports the limitations on victims' remedies.

IV. A MISPLEA WOULD BE APPROPRIATE IN THIS CASE IF THE PROSECUTOR COMMITTED A FRAUD ON THE TRIAL COURT

For the reasons explained above, the Victims cannot move for a misplea, and any misplea cannot be based on a violation of the Victims' rights. However, the State can move for a misplea, and a party's fraud that leads a trial court to accept a guilty plea is an appropriate ground for granting a misplea. If the prosecutor lied to the trial court when she represented that the Victims agreed with the terms of the plea agreement, then she committed a fraud on the trial court. If that fraud led the court to accept the plea, then a misplea would be appropriate. Therefore, this Court should remand this case to the trial court for

an evidentiary hearing to determine if the prosecutor did commit a fraud on the court. If so, the State would then move for a misplea.

A. Under *State v. Kay*, a misplea should be granted when fraud leads a trial court to accept a guilty plea.

This Court first recognized the remedy of a misplea in *State v. Kay*, 717 P.2d 1294 (Utah 1986). While robbing a Cedar City bar, Kay shot three people execution-style. *Id.* at 1296. The State charged him with three counts of first degree murder, all capital felonies, and four counts of aggravated robbery, all first degree felonies. *Id.* Three weeks before his scheduled trial, Kay's counsel presented the trial court with an "'In-Camera Motion for Conditional Plea of Guilty[,]'" offering that Kay would plead guilty as charged and confess in open court in exchange for the promise that he would not be sentenced to death. *Id.* The State was unaware of the terms of the plea until the motion was presented to the court. *Id.*

The motion was presented in chambers and discussed at length off the record. *Id.* The trial court granted a one-hour recess to allow the State to consider the matter, and Kay to consult with his counsel. *Id.* A plea colloquy was then conducted on the record where Kay pleaded guilty as charged "'on the condition that [his] life not be forfeited,'" and gave a full confession detailing the robbery and murders. *Id.* at 1296-97 (alteration in original). The trial court

accepted the pleas. *Id.* at 1297. The State never objected on the record to the pleas. *Id.*

Two weeks after the plea hearing, a new attorney appeared for the State and asked the trial court to reconsider its acceptance of the pleas. *Id.* This occurred after the details of Kay's confession were reported in the media and several public demonstrations were held in Cedar City protesting the plea agreement. *Id.* One demonstration "involved parading an effigy of Kay crowned with the head of a dead pig through the town with a placard calling for the recall of the trial judge in the upcoming elections." *Id.*

After a lengthy hearing on the State's motion, the trial court vacated the promise of life imprisonment on the grounds that (1) the State had been surprised by, and had disagreed with the plea agreement, and (2) the conditional plea was illegal and therefore its acceptance constituted plain error. *Id.* The court gave Kay the option of facing a sentencing hearing where the death penalty could be imposed, withdrawing his guilty pleas and going to trial, or pursuing an interlocutory appeal. *Id.*

On appeal, Kay sought specific enforcement of the original agreement. *Id.* This Court disagreed, reasoning that a "misplea" was appropriate. *Id.* at 1303-07.

This Court first addressed, and rejected, both of the State's contentions that Kay's pleas should be invalidated because they violated rule 11 of the Utah Rules

of Criminal Procedure. *Id.* at 1300-02. First, the Court held that the acceptance of a "conditional plea" did not violate Rule 11. *Id.* at 1300-01. Second, the Court held that although the trial court violated Rule 11 by participating in the plea negotiations, there was no evidence that the State did not acquiesce in the negotiated agreement. *Id.* at 1301, 1305. Therefore, the Rule 11 violation did not invalidate Kay's pleas. *Id.* at 1301-02.

This Court then explained why a misplea should be declared. *Id.* at 1302-07. Relying on the analysis in *United States v. Cruz*, 709 F.2d 111 (1st Cir. 1983), and analogizing to the granting of a mistrial, this Court held that a misplea can be properly granted where "'manifest necessity'" so requires.[6] *Id.* The Court explained that a misplea is the equivalent of a mistrial. *See id.* at 1303-05. The mistrial concept recognizes that a defendant can be tried a second time, even though jeopardy attached in his first trial, if "manifest necessity" required his first trial to be terminated before a verdict was reached. *See id.* at 1303. Similarly, a misplea recognizes that although jeopardy has attached because a guilty plea

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[6] Since *Kay's* issuance, the First Circuit has recognized that "the [United States Supreme] Court seems to have overruled our double jeopardy analysis in *Cruz*." *United States v. Santiago Soto*, 825 F.2d 616, 619 (1st Cir. 1987). The case to which the First Circuit refers is *Ohio v. Johnson*, 467 U.S. 493 (1984). The First Circuit interpreted *Johnson* as holding that "an acceptance of a guilty plea is legally different from a conviction based on a jury's verdict." *Santiago Soto*, 825 F.2d at 619. Therefore, the First Circuit concluded in *Santiago Soto* that, under *Johnson*, it is "unnecessary to demonstrate 'manifest necessity' to warrant a judicial vacation of a guilty plea." *Id.*

has been accepted, the plea may be properly set aside based on a showing of "manifest necessity." *See id.* at 1303-05.

This Court enumerated two specific circumstances in which a misplea would be appropriate. *See id.* at 1305. First, "where obvious reversible error has been committed in connection with the terms or the acceptance of the plea agreement and no undue prejudice to the defendant is apparent." *Id.* Second, "where some fraud or deception by one party leads to the acceptance of the plea agreement by the other party or the court." *Id.* Realizing that it could not anticipate every possible misplea scenario, this Court also recognized that "[t]here may be other circumstances where the balancing of the interests and legitimate expectations of the defendant and the public will also warrant a misplea." *Id.*

This Court reasoned that the following circumstances in *Kay* justified the declaration of a misplea. *Id.* at 1305-06. First, Kay's counsel "initiated [a] series of errors" when, in violation of Rule 11, "he proposed a plea bargain to the trial court without having first obtained the State's consent." *Id.* at 1305. Second, the trial court "erred by entertaining the plea" because it should have determined whether the prosecutor agreed with the proposal before considering it. *Id.* at 1305-06. The prosecution then "compounded" these problems by failing to timely object to the plea and, in fact, by appearing to acquiesce in the plea. *Id.* at

1306. However, this Court noted that despite a lack of record support, the trial court had found that the State did disagree with the plea. *Id.* at 1305, 06. This Court countenanced that finding on the grounds that the trial judge was in a better position to ascertain the State's true position. *Id.* at 1305. Given these circumstances, a misplea was appropriate. *Id.* at 1306.

B. If the Victims' allegations are true, then a misplea should be granted.

Had the trial court been informed of the Victims' disagreement with the proposed plea agreement, it could have properly refused to accept the agreement. *See State v. Montiel*, 2005 UT 48, ¶ 13, 122 P.3d 571 ("[I]t is well established under Utah law that trial courts are not required to accept plea agreements"). The trial court could have rejected the proposed plea agreement based on either the prosecutor's failure to correctly inform the Victims about the agreement's terms, or the Victims' disagreement with its terms. *See Montiel*, 2005 UT 48, ¶ 29 (citing *Hoskins v. Maricle*, 150 S.W.3d 1, 25 (Ky. 2004)).

In this case, if the Victims' allegations are true, a misplea should be granted under *Kay's* second misplea category: "fraud . . . by one party lead[ing] to the acceptance of the plea agreement by . . . the court."[7] 717 P.2d at 1305. The

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[7] A misplea would not be appropriate under *Kay's* first circumstance because, as explained in Point III, even if the Victims' rights were violated in connection with the acceptance of the plea, that error is not "reversible error." *See Kay*, 717 P.2d at 1305.

Victims allege that, at the plea hearing, the prosecutor misrepresented to the trial court that they were satisfied with the plea agreement. Br. Aplt. at 9, 38. If that is true, then *Kay's* second misplea circumstance would be satisfied. *See* 717 P.2d at 1305.

Subsequent cases interpreting *Kay* have articulated the misplea standard as requiring a showing of both "'manifest necessity' and 'no undue prejudice to the defendant.'" *State v. Horrocks*, 2001 UT App 4, ¶ 27, 17 P.3d 1145 (quoting *State v. Moss*, 921 P.2d 1021, 1025, (Utah App. 1996) (in turn quoting *Kay*, 717 P.2d at 1305). However, *Kay* requires the additional showing of "no undue prejudice to the defendant" only with respect to a misplea based on "obvious reversible error." *See* 717 P.2d at 1305.

However, even if the additional showing was necessary, it is satisfied in this case. Defendant would suffer no "undue prejudice" by the declaration of a misplea because a misplea would not deprive him of anything to which he was entitled. *See Montiel*, 2005 UT 48, ¶ 13; *see also State v. Greuber*, 2007 UT 50, ¶ 13, 165 P.3d 1185 ("There is no right to a plea offer or to a successful plea bargain"). If the trial court finds that the prosecutor committed a fraud on the court, and that, but for that fraud, it would have rejected the plea, then declaring a misplea would merely deprive defendant of a windfall. Any prejudice to defendant in

negating his windfall would not qualify as "undue prejudice." *See Kay*, 717 P.2d at 1305.

Moreover, a misplea would be significantly less prejudicial to Defendant than the misplea was to Kay. One condition of Kay's plea agreement was that he not face the possibility of a death sentence. *Id.* at 1296. The misplea deprived him of that benefit. *Id.* at 1307. However, the stakes in this case are significantly lower. Defendant was originally charged with only two counts of negligent homicide, class A misdemeanors. R.6-7.

Kay could arguably be distinguished from this case on the ground that Kay bore some responsibility for creating the circumstances that generated the misplea, whereas Defendant here apparently does not. However, as explained, a misplea in this case would simply deprive Defendant of something to which he was never entitled.

The State cannot locate any other case addressing the precise issue before the court. However, in a concurring opinion in *State v. Comstock*, 485 N.W.2d 354 (Wis. 1992), Justice Steinmetz observed that "any incorrect statement that the victim acquiesces to in [sic] the plea arrangement may create a fraud on the court resulting in the judge later voiding the entire proceedings." *Id.* at 370.

Other courts that have considered whether a victim can set aside a guilty plea based on a violation of the victim's rights have all refused to do so. *See State*

ex rel. Goldesberry v. Taylor, 233 S.W.3d 796, 797-99 (Mo. App. 2007); *State v. Means*, 926 A.2d 328, 334-35 (N.J. 2007); *Ex Parte Littlefield*, 540 S.E.2d 81, 86-87 (S.C. 2000); *State v. McAlear*, 519 N.W.2d 596, 597-600 (S.D. 1994). As explained in Point III, those holdings are correct. However, none of those cases involved a prosecutor defrauding a trial court into accepting the plea agreement. *See Goldesberry*, 233 S.W.3d at 797-99 (trial court was not mislead about the victim's position, it was simply ignorant of that position); *Means*, 926 A.2d at 334-35 (because the victims were not aware of the plea agreement, there was no evidence that the victims objected to the plea); *Ex Parte Littlefield*, 540 S.E.2d at 82-83, 86 (the victims complaining that they were denied an opportunity to address the court did not qualify as "victims" under the statute); *McAlear*, 519 N.W.2d at 597-98 (prosecutor truthfully informed the court that she had not discussed the agreement with the victim).

The Victims allege that the prosecutor committed fraud on the trial court that may have led to its acceptance of the plea. If those facts are true, a misplea is appropriate under *Kay's* second circumstance. *See* 717 P.2d at 1305.

C. Remand is necessary to determine whether a fraud occurred.

A remand is necessary to determine whether the prosecutor actually committed a fraud on the trial court. At this point, the claim of fraud is based solely on statements in the Victims' affidavits. Those allegations have never been

tested. No evidentiary hearing was held below and no findings of fact have been entered regarding the prosecutor's communications with the Victims. Therefore, an evidentiary hearing is necessary to determine whether a fraud occurred that led the trial court to accept the plea.

Remand for factual findings is appropriate when a trial court has not ruled on a dispositive factual issue. For example, in *State v. Strain*, 779 P.2d 221, 227 (Utah 1989), this Court remanded for an evidentiary hearing "to determine the voluntariness of defendant's confession." Strain moved to suppress his confession on the grounds that the *Miranda* warning was defective and that police threats and promises rendered the confession involuntary. *Id.* at 222. The trial court denied Strain's motion but "did not specifically address the voluntariness challenge." *Id.* Therefore, this Court remanded for an evidentiary hearing because the record was inadequate to address the voluntariness issue. *Id.* at 227. Likewise, this Court remanded for an evidentiary hearing in *State v. Abeyta*, 852 P.2d 993, 996 (Utah 1993), where the trial court denied Abeyta's motion to withdraw his guilty plea on jurisdictional grounds without reaching the underlying factual issue regarding the knowing and voluntary nature of his plea. *See also*, *State v. Arroyo*, 796 P.2d 684, 687 (Utah 1990) (remanding for an evidentiary hearing); *Stan Katz Real Estate Inc. v. Chavez*, 565 P.2d 1142, 1144 (Utah 1977) (same).

The State's failure to contest the Victims' allegations below does not prevent this Court from remanding for an evidentiary hearing. The State did have an opportunity to contest the Victims' allegations below. However, it did not need to. The Victims filed their affidavits in support of their motions for a misplea and a restitution hearing. As explained above in Point III, the Victims could not properly obtain these remedies. Therefore, there was no reason for the State to contest the Victims' allegations. The proposed remedy of the State moving for a misplea based on the prosecutor's alleged fraud on the court was not considered until the Attorney General's Office reviewed the case. The truthfulness of the Victims' allegations did not become an issue until then.

D. Granting a misplea would not violate Double Jeopardy.

Defendant claimed in the Court of Appeals that vacating his plea in abeyance would violate the protection against double jeopardy. Br. Appellee in Case No. 20061126-CA. Amicus perceives no such barrier to a misplea. Br. Amicus at 9-11.

The Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense." *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 306-307 (1984).

The double jeopardy issue here is technically "unripe for adjudication." *State v. Herrera*, 895 P.2d 359, 371 (Utah 1995) (citing *Redwood Gym v. Salt Lake County Comm'n*, 624 P.2d 1138, 1148 (Utah 1981)). It will ripen only if (1) this Court either determines that, under the law, the Victims are entitled to vacate Defendant's plea, or that a remand is necessary to determine if the prosecutor committed fraud on the court; (2) this Court declares a misplea based on the Victims' affidavits, or the trial court finds that the prosecutor committed fraud on the court and grants the State's subsequent motion for misplea; (3) the State pursues a second prosecution for the same offenses, and (4) Defendant asserts a double jeopardy defense. *See State v. Ortiz*, 1999 UT 84, ¶ 4, 987 P.2d 39 (where there are several possible circumstances under which the appellate court would not need to address the issue presented by the petition, that issue is not ripe for adjudication). Accordingly, the double jeopardy issue is not yet ripe.

Nevertheless, the issue looms on the horizon, and Defendant briefed the issue in the Court of Appeals. Therefore, because this Court may choose to address the question of double jeopardy, the State will brief it.

Kay establishes that "'jeopardy attaches upon acceptance of the guilty plea.'" *Kay*, 717 P.2d at 1303 (quoting *Cruz*, 709 F.2d at 114) (bracketing in original). However, where "manifest necessity" justifies the declaration of a

misplea, a plea agreement may be set aside and the prosecution may proceed without violating the Federal or State Double Jeopardy Clause. *See id.* at 1304.

The United States Supreme Court has repeatedly affirmed that if the granting of a mistrial meets the "'manifest necessity' requirement," then the Double Jeopardy Clause "d[oes] not bar retrial." *Illinois v. Somerville*, 410 U.S. 458, 459 (1973); *accord Arizona v. Washington*, 434 U.S. 497, 516 (1978); *Garrett v. United States*, 471 U.S. 773, 796 (1985).

In this case, if the trial court finds that the prosecutor committed a fraud on the court, then the grant of a misplea would fall squarely within *Kay's* second misplea category. *See Kay*, 717 P.2d 1305 (declaring that a misplea would be appropriate where fraud by a party led the trial court to accept the plea). Therefore, continued prosecution would not be barred by either the Federal or State Double Jeopardy Clauses because the misplea would satisfy the "manifest necessity" standard. *See id.* at 1303; *Somerville*, 410 U.S. at 459.

Satisfying *Kay's* second misplea category would be sufficient to overcome any double jeopardy challenge. *See* 717 P.2d at 1303, 1305. Nevertheless, additional considerations would also defeat any double jeopardy bar.

The double jeopardy protections that arise when a defendant pleads guilty are less weighty than those that arise when a defendant goes to trial. This Court has recognized "that double jeopardy considerations are not as heavily

implicated in a plea bargain as in a trial setting." *Kay*, 717 P.2d at 1305 (citing *Cruz*, 709 F.2d at 114).

Likewise, the Tenth Circuit has held that "[a] plea agreement involves a qualitatively distinct type of jeopardy from that which attaches after a trial and conviction." *United States v. Thompson*, 814 F.2d 1472, 1479 (10th Cir. 1987). "The most important value" that the Double Jeopardy Clause protects "is the prevention of Government harassment." *Id.* However, a defendant who pleads guilty "is far less likely to be subject to Government abuse." *Id.* Presumably, both the defendant and the Government negotiate from an equal bargaining position. *Id.* "Furthermore, the double jeopardy protection is intended to prevent exposure to the *risk* of conviction." *Id.* (citing *Abney v. United States*, 431 U.S. 651, 661 (1977) (emphasis in original). A defendant who pleads guilty "is not exposed to the risk of conviction. On the contrary, he knows exactly what will happen in the proceeding." *Id.* Similarly, any anxiety or embarrassment that may be associated with a plea bargain differs from that associated with a trial. *Id.* "The defendant who pleads guilty does not 'run the gauntlet' in the same way a defendant who goes to trial does." *Id.*

Additionally, continued prosecution in this case would not appear to violate any of the principles that the double jeopardy protection is designed to protect. The protection against a second prosecution for the same offense after

acquittal or conviction "ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence." *Ohio v. Johnson*, 467 U.S. 493, 498-99 (1984). As explained, these concerns are significantly alleviated when a conviction results from a guilty plea.

Moreover, there was neither a conviction nor an acquittal in this case because Defendant's guilty pleas were withdrawn and the case dismissed. Therefore, it is unclear whether the protection against a second prosecution would even apply in this circumstance.

Nor would the protection against cumulative punishments bar additional proceedings in this case. That protection does not create an absolute bar to the imposition of a second punishment in a subsequent proceeding. *See id.* at 499. Rather, it "is designed to ensure that the sentencing discretion of the courts is confined to the limits established by the legislature." *Id.* at 499. If a punishment is imposed in a proceeding that is later vacated, and a subsequent proceeding results in the imposition of a second punishment, "the Clause's third protection ensures that . . . a defendant receives credit for time already served." *Id.* (citing *North Carolina v. Pearce*, 395 U.S. 711, 718 (1969)). Therefore, in this case, Defendant can receive a second punishment in a subsequent proceeding without

violating his double jeopardy protections provided he receives credit for the money he has paid and the time he has spent in community service and a driving course. *See id.*

Moreover, subsequent imposition of restitution would not violate double jeopardy protections as long as the amount imposed may "'fairly be characterized as remedial.'" *See Monson v. Carver*, 928 P.2d 1017, 1027 (Utah 1996) (citing *United States v. Halper*, 490 U.S. 435, 448-49 (1989)). "The sole test to be used in making this determination requires a court, on a case-by-case basis, to compare the harm suffered as a result of a defendant's conduct with the size of the civil penalty." *Id.* A restitution order "can be considered 'punishment'" only "[i]f the amount of the penalty is so grossly excessive that it cannot be fairly characterized as compensatory or remedial." *Id.* Therefore, subsequent imposition of a restitution order in this case would not violate double jeopardy protections if the amount ordered was equivalent to the Victims' pecuniary loss. *See id.*

E. The dismissal in this case does not preclude granting a misplea.

The trial court accepted Defendant's plea in abeyance agreement on 12 September 2005. R.15-17, 19b-21. The agreement specified that Defendant's guilty pleas would be held in abeyance for twelve months. R.16, 19b-20.

On 14 August 2006, the trial court granted the Victims' motion to stay the plea in abeyance period while the Victims' motions for a misplea and requesting a restitution hearing were pending. R.45. At that point, 336 of the 365 days in the abeyance period had elapsed, leaving 29 days remaining.

On 9 November 2006, the trial court entered a ruling and order denying the Victims' motions for misplea and a restitution hearing. R.204-06. The Victims then notified the court of their intention to appeal and requested that the stay remain in place until the appeal was resolved. R.211-12. On 20 November 2006, the trial court entered an order continuing the stay of the plea in abeyance pending appeal and clarifying that any violations of the law by Defendant during the stay would not violate the terms of the plea in abeyance agreement. R.216-17.

On 14 June 2007, Defendant filed a motion to dismiss his plea in abeyance on the grounds that UTAH CODE ANN. § 77-2a-2(5) imposes an eighteen-month maximum on the period that a plea to a misdemeanor charge may be held in abeyance. R.232-39. Defendant argued that the trial court should dismiss the case because eighteen months had passed since the acceptance of the plea in abeyance and he had completed everything required of him under the plea in abeyance agreement. R.232-39.

On 27 August 2007, the trial court granted Defendant's motion and dismissed the case with prejudice. R.276. The trial court based its ruling on the language of section 77-2a-2(5) and the Court of Appeals' interpretation of that section in *State v. Schubarth*, 2005 UT App. 166U. R.300-02. The trial court also found that continuing the stay pending an appeal would amount to a delay of the criminal case in violation of section 77-38-11(2)(b). R.302.

The dismissal in this case does not preclude the granting of a misplea because a misplea would invalidate the basis for the dismissal. The case was dismissed because the trial court found that, under section 77-2a-2(5), it could not stay the plea in abeyance term beyond eighteen months. R.300-02. However, if the plea in abeyance was fraudulently accepted, then it is void and cannot support the dismissal.

Moreover, Defendant has not completed the terms of his plea in abeyance. The twelve-month abeyance period has not expired, because the period was stayed with 29 days remaining. R.45. That stay was never lifted and therefore the remaining 29 days never elapsed before the case was dismissed with prejudice. R.216-17, 276. Therefore, neither the language of section 77-2a-2(5), nor the holding in *Schubarth*, precludes a misplea in this case.

Section 77-2a-2(5) states that "[a] plea shall not be held in abeyance for a period longer than 18 months if the plea was to any class of misdemeanor or

longer than three years if the plea was to any degree of felony or to any combination of misdemeanors and felonies." UTAH CODE ANN. § 77-2a-2(5). The Victims argue that the three-year period applies in this case because Defendant pled to a "combination of misdemeanors." Br. Aplt. at 50. The Victims are incorrect.

Defendant did plead to two class A misdemeanors and two class C misdemeanors. R.16. However, the statute's three-year period is only triggered if the plea is to "any combination of misdemeanors *and* felonies." UTAH CODE ANN. § 77-2a-2(5) (emphasis added). This conjunctive phrase plainly requires that, to trigger the three-year period, a plea must include at least one felony charge. The Victims' reading renders the words "and felonies" inoperative, and is therefore incorrect. *See State ex rel. M.M.*, 2003 UT 54, ¶ 8, 82 P.3d 1104 (reaffirming that when interpreting a statute, this Court's "'fundamental duty'" is "'to give effect, if possible, to every word of the statute'") (quoting *Arredondo v. Avis Rent A Car Sys., Inc.*, 2001 UT 29, ¶ 13, 24 P.3d 928).

Nevertheless, although the eighteen-month maximum applies in this case, it was not violated. As explained, Defendant's plea has only been held in abeyance for 336 days. R.45. Although the plea in abeyance term was stayed, Defendant was not subject to the terms of the plea during the stay. R.216-17. Therefore, his plea has not been held in abeyance for a period longer than that

provided in section 77-2a-2(5). Additionally, if a misplea is declared, then the basis for the dismissal is invalidated.

State v. Schubarth does not apply for the same reason. In *Schubarth*, the trial court approved a plea agreement that required holding the defendant's pleas in abeyance for six years. 2005 UT App 166U, ¶ 2. When Schubarth failed to make his restitution payments, the trial court found that he violated the agreement and entered his guilty pleas. *Id.* at ¶¶ 1-2. Schubarth then sought a misplea on the basis that the six-year term violated section 77-2a-2(5), even though he had originally requested that term because it allowed him "to make his restitution payments realistic and feasible" by extending them over a longer time. *Id.* at ¶¶ 2-3 n.2. The Court of Appeals agreed that a misplea was appropriate because the six-year term violated 77-2a-2(5). *Id.* at ¶ 3.

Schubarth establishes that a plea in abeyance agreement that subjects a defendant to its terms for a period longer than the maximum established by section 77-2a-2(5) is invalid and therefore unenforceable. *Id.* at ¶¶ 1-3. The plea in abeyance agreement in this case did not violate that principle. Defendant has been subject to the terms of the plea in abeyance for only 336 days and, under the agreement, can only be subject to the terms of the agreement for a maximum of 365 days. R.45.

For the same reason, the trial court's grant of a stay did not violate *Schubarth*. The stay did not require Defendant to be subject to the plea in abeyance agreement for longer than eighteen months. Rather, it tolled that time at 336 days and contemplated that the remaining 29 days would begin running after the Victims' appeal was concluded. R.45, 216-17.

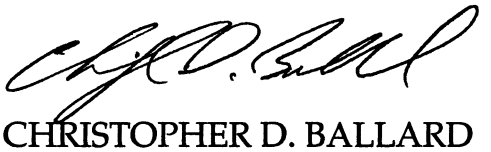
Finally, section 77-38-11(2)(b) does not prevent the grant of a misplea in this case. That section prevents a victim's appeal from delaying a criminal case. § 77-38-11(2)(b). However, it does not prevent a court from vacating the result of the case when that result was fraudulently obtained.

CONCLUSION

Because the Victims may not obtain a misplea, or any other remedy that would reopen this case, this Court should affirm the order denying the Victims' motion for a misplea and restitution hearing. Nevertheless, because the plea may have been entered as a result of a fraud on the trial court, this Court should remand for an evidentiary hearing to determine if the prosecutor defrauded the trial court at the plea hearing and, if so, to allow the State to move for a misplea.

Respectfully submitted 19 May 2008.

MARK L. SHURTLEFF
Utah Attorney General



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MAILING CERTIFICATE

I hereby certify that on 19 May 2008, I mailed, postage prepaid, two accurate copies of the foregoing BRIEF OF APPELLEE to:

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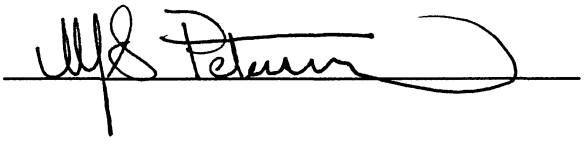

Addenda

Addendum A

UTAH CONST. art. I, § 28 [Declaration of the rights of crime victims.] (1994)

(1) To preserve and protect victims' rights to justice and due process, victims of crimes have these rights, as defined by law:

(a) To be treated with fairness, respect, and dignity, and to be free from harassment and abuse throughout the criminal justice process;

(b) Upon request, to be informed of, be present at, and to be heard at important criminal justice hearings related to the victim, either in person or through a lawful representative, once a criminal information or indictment charging a crime has been publicly filed in court; and

(c) To have a sentencing judge, for the purpose of imposing an appropriate sentence, receive and consider, without evidentiary limitation, reliable information concerning the background, character, and conduct of a person convicted of an offense except that this subsection does not apply to capital cases or situations involving privileges.

(2) Nothing in this section shall be construed as creating a cause of action for money damages, costs, or attorney's fees, or for dismissing any criminal charge, or relief from any criminal judgment.

(3) The provisions of this section shall extend to all felony crimes and such other crimes or acts, including juvenile offenses, as the Legislature may provide.

(4) The Legislature shall have the power to enforce and define this section by statute.

76-3-201. Definitions—Sentences or combination of sentences allowed—Civil penalties—Hearing.

(1) As used in this section:

(a) "Conviction" includes a:

(i) judgment of guilt; and

(ii) plea of guilty.

(b) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(c) "Pecuniary damages" means all special damages, but not general damages, which a person could recover against the defendant in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the money equivalent of property taken, destroyed, broken, or otherwise harmed, and losses including earnings and medical expenses.

(d) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, and payment for expenses to a governmental entity for extradition or transportation and as further defined in Title 77, Chapter 38a, Crime Victims Restitution Act.

(e) (i) "Victim" means any person who the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(ii) "Victim" does not include any coparticipant in the defendant's criminal activities.

(2) Within the limits prescribed by this chapter, a court may sentence a person convicted of an offense to any one of the following sentences or combination of them:

(a) to pay a fine;

(b) to removal or disqualification from public or private office;

(c) to probation unless otherwise specifically provided by law;

(d) to imprisonment;

(e) on or after April 27, 1992, to life in prison without parole; or

(f) to death.

(3) (a) This chapter does not deprive a court of authority conferred by law to:

(i) forfeit property;

(ii) dissolve a corporation;

(iii) suspend or cancel a license;

(iv) permit removal of a person from office;

(v) cite for contempt; or

(vi) impose any other civil penalty.

(b) A civil penalty may be included in a sentence.

(4) (a) When a person is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to the victims, or for conduct for which the defendant has agreed to make restitution as part of a plea agreement.

(b) In determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Title 77, Chapter 38a, Crime Victims Restitution Act.

(5) (a) In addition to any other sentence the court may impose, the court shall order the defendant to pay restitution of governmental transportation expenses if the defendant was:

(i) transported pursuant to court order from one county to another within the state at governmental expense to resolve pending criminal charges;

(ii) charged with a felony or a class A, B, or C misdemeanor; and

(iii) convicted of a crime.

(b) The court may not order the defendant to pay restitution of governmental transportation expenses if any of the following apply:

(i) the defendant is charged with an infraction or on a subsequent failure to appear a warrant is issued for an infraction; or

(ii) the defendant was not transported pursuant to a court order.

(c) (i) Restitution of governmental transportation expenses under Subsection (5)(a)(i) shall be calculated according to the following schedule:

(A) $75 for up to 100 miles a defendant is transported;

(B) $125 for 100 up to 200 miles a defendant is transported; and

(C) $250 for 200 miles or more a defendant is transported.

(ii) The schedule of restitution under Subsection (5)(c)(i) applies to each defendant transported regardless of the number of defendants actually transported in a single trip.

(d) If a defendant has been extradited to this state under Title 77, Chapter 30, Extradition, to resolve pending criminal charges and is convicted of criminal activity in the county to which he has been returned, the court may, in addition to any other sentence it may impose, order that the defendant make restitution for costs expended by any governmental entity for the extradition.

(6) (a) In addition to any other sentence the court may impose, and unless otherwise ordered by the court pursuant to Subsection (6)(c), the defendant shall pay restitution to the county for the cost of incarceration in the county correctional facility before and after sentencing if:

(i) the defendant is convicted of criminal activity that results in incarceration in the county correctional facility; and

(ii) (A) the defendant is not a state prisoner housed in a county correctional facility through a contract with the Department of Corrections; or

(B) the reimbursement does not duplicate the reimbursement provided under Section 64-13e-104 if the defendant is a state probationary inmate, as defined in Section 64-13e-102, or a state parole inmate, as defined in Section 64-13e-102.

(b) (i) The costs of incarceration under Subsection (6)(a) are the daily inmate incarceration costs and medical and transportation costs for the county correctional facility.

(ii) The costs of incarceration under Subsection (6)(a) do not include expenses incurred by the county correctional facility in providing reasonable accommodation for an inmate qualifying as an individual with a disability as defined and covered by the federal Americans with Disabilities Act of 1990, 42 U.S.C. 12101 through 12213, including medical and mental health treatment for the inmate's disability.

(c) In determining whether to order that the restitution required under this Subsection (6) be reduced or that the defendant be exempted from the

restitution, the court shall consider the criteria under Subsections 77-38a-302(5)(c)(i) through (iv) and shall enter the reason for its order on the record.

(d) If on appeal the defendant is found not guilty of the criminal activity under Subsection (6)(a)(i) and that finding is final as defined in Section 76-1-304, the county shall reimburse the defendant for restitution the defendant paid for costs of incarceration under Subsection (6)(a).

Pleas In Abeyance

77-2a-1. Definitions.

For the purposes of this chapter:

(1) "Plea in abeyance" means an order by a court, upon motion of the prosecution and the defendant, accepting a plea of guilty or of no contest from the defendant but not, at that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions as set forth in a plea in abeyance agreement.

(2) "Plea in abeyance agreement" means an agreement entered into between the prosecution and the defendant setting forth the specific terms and conditions upon which, following acceptance of the agreement by the court, a plea may be held in abeyance.

77-2a-2. Plea in abeyance agreement -- Negotiation -- Contents -- Terms of agreement -- Waiver of time for sentencing.

(1) At any time after acceptance of a plea of guilty or no contest but prior to entry of judgment of conviction and imposition of sentence, the court may, upon motion of both the prosecuting attorney and the defendant, hold the plea in abeyance and not enter judgment of conviction against the defendant nor impose sentence upon the defendant within the time periods contained in Rule 22(a), Utah Rules of Criminal Procedure.

(2) The defendant shall be represented by counsel during negotiations for a plea in abeyance and at the time of acknowledgment and affirmation of any plea in abeyance agreement unless the defendant shall have knowingly and intelligently waived his right to counsel.

(3) The defendant has the right to be represented by counsel at any court hearing relating to a plea in abeyance agreement.

(4) (a) Any plea in abeyance agreement entered into between the prosecution and the defendant and approved by the court shall include a

full, detailed recitation of the requirements and conditions agreed to by the defendant and the reason for requesting the court to hold the plea in abeyance.

(b) If the plea is to a felony or any combination of misdemeanors and felonies, the agreement shall be in writing and shall, prior to acceptance by the court, be executed by the prosecuting attorney, the defendant, and the defendant's counsel in the presence of the court.

(5) A plea shall not be held in abeyance for a period longer than 18 months if the plea was to any class of misdemeanor or longer than three years if the plea was to any degree of felony or to any combination of misdemeanors and felonies.

(6) A plea in abeyance agreement shall not be approved unless the defendant, before the court, and any written agreement, knowingly and intelligently waives time for sentencing as designated in Rule 22(a), Utah Rules of Criminal Procedure.

77-2a-3. Manner of entry of plea -- Powers of court.

(1) (a) Acceptance of any plea in anticipation of a plea in abeyance agreement shall be done in full compliance with the provisions of Rule 11, Utah Rules of Criminal Procedure.

(b) In cases charging offenses for which bail may be forfeited, a plea in abeyance agreement may be entered into without a personal appearance before a magistrate.

(2) A plea in abeyance agreement may provide that the court may, upon finding that the defendant has successfully completed the terms of the agreement:

(a) reduce the degree of the offense and enter judgment of conviction and impose sentence for a lower degree of offense; or

(b) allow withdrawal of defendant's plea and order the dismissal of the c

(3) Upon finding that a defendant has successfully completed the terms of a plea in abeyance agreement, the court may reduce the degree of the offense or dismiss the case only as provided in the plea in abeyance agreement or as agreed to by all parties. Upon sentencing a defendant for any lesser offense pursuant to a plea in abeyance agreement, the court may not invoke Section 76-3-402 to further reduce the degree of the offense.

(4) The court may require the Department of Corrections to assist in the administration of the plea in abeyance agreement as if the defendant were on probation to the court under Section 77-18-1.

(5) The terms of a plea in abeyance agreement may include:

(a) an order that the defendant pay a nonrefundable plea in abeyance fee, with a surcharge based on the amount of the plea in abeyance fee, both of which shall be allocated in the same manner as if paid as a fine for a criminal conviction under Section 78-3-14.5 and a surcharge under Title 63, Chapter 63a, Crime Victim Reparation Trust, Public Safety Support Funds, Substance Abuse Prevention Account, and Services for Victims of Domestic Violence Account, and which may not exceed in amount the maximum fine and surcharge which could have been imposed upon conviction and sentencing for the same offense;

(b) an order that the defendant pay restitution to the victims of his actions as provided in Title 77 Chapter 38a, Crime Victims Restitution Act;

(c) an order that the defendant pay the costs of any remedial or rehabilitative program required by the terms of the agreement; and

(d) an order that the defendant comply with any other conditions which could have been imposed as conditions of probation upon conviction and sentencing for the same offense.

(6) A court may not hold a plea in abeyance without the consent of both the prosecuting attorney and the defendant. A decision by a prosecuting attorney not to agree to a plea in abeyance is final.

(7) No plea may be held in abeyance in any case involving a sexual offense against a victim who is under the age of 14.

(8) Beginning on July 1, 2008, no plea may be held in abeyance in any case involving a driving under the influence violation under Section 41-6a-502.

77-2a-3.1. Restrictions on pleas to driving under the influence violations.

(1) As used in this section, a "driving under the influence court" means an intensive judicially supervised treatment program:

(a) as defined by rules of the Utah Judicial Council; and

(b) that has been approved by the Utah Judicial Council as a driving under the influence court.

(2) (a) A plea may not be held in abeyance in any case involving a driving under the influence violation under Section 41-6a-502 that is punishable as a felony or class A misdemeanor.

(b) A plea to a driving under the influence violation under Section 41-6a-502 that is punishable as a class B misdemeanor may not be held in abeyance unless:

(i) (A) the plea is entered pursuant to participation in a driving under the influence court; and

(B) the plea is approved by the district attorney, county attorney, attorney general, or chief prosecutor of a municipality; or

(ii) evidentiary issues or other circumstances justify resolution of the case with a plea in abeyance.

(3) A plea to a driving under the influence violation under Section 41-6a-502 may not be dismissed or entered as a conviction of a lesser offense pursuant to Subsection (2)(b)(i) if the defendant:

(a) has been convicted of any other violation which is defined as a conviction under Subsection 41-6a-501(2);

(b) has had a plea to any other violation of Section 41-6a-502 held in abeyance; or

(c) in the current case:

(i) operated a vehicle in a negligent manner proximately resulting in bodily injury to another or property damage to an extent requiring reporting to a law enforcement agency under Section 41-6a-401;

(ii) had a blood or breath alcohol level of .16 or higher; or

(iii) had a passenger under 18 years of age in the vehicle at the time of the offense.

77-2a-4. Violation of plea in abeyance agreement -- Hearing -- Entry of judgment and imposition of sentence -- Subsequent prosecutions.

(1) If, at any time during the term of the plea in abeyance agreement, information comes to the attention of the prosecuting attorney or the court that the defendant has violated any condition of the agreement, the court, at the request of the prosecuting attorney, made by appropriate motion and affidavit, or upon its own motion, may issue an order requiring the defendant to appear before the court at a designated time and place to show cause why the court should not find the terms of the agreement to have been violated and why the agreement should not be terminated. If, following an evidentiary hearing, the court finds that the defendant has failed to substantially comply with any term or condition of the plea in abeyance agreement, it may terminate the agreement and enter judgment of conviction and impose sentence against the defendant for the offense to which the original plea was entered. Upon entry of judgment of conviction

and imposition of sentence, any amounts paid by the defendant as a plea in abeyance fee prior to termination of the agreement shall be credited against any fine imposed by the court.

(2) The termination of a plea in abeyance agreement and subsequent entry of judgment of conviction and imposition of sentence shall not bar any independent prosecution arising from any offense that constituted a violation of any term or condition of an agreement whereby the original plea was placed in abeyance.

Victims' Rights Act (1987)

77-37-1. Legislative intent.

(1) The Legislature recognizes the duty of victims and witnesses of crime to fully and voluntarily cooperate with law enforcement and prosecutorial agencies, the essential nature of citizen cooperation to state and local law enforcement efforts, and the general effectiveness and well-being of the criminal justice system of this state. In this chapter, the Legislature declares its intent to ensure that all victims and witnesses of crime are treated with dignity, respect, courtesy, and sensitivity, and that the rights extended in this chapter to victims and witnesses of crime are honored and protected by law in a manner no less vigorous than protections afforded criminal defendants.

(2) The Legislature finds it is necessary to provide child victims and child witnesses with additional consideration and different treatment than that usually afforded to adults. The treatment should ensure that children's participation in the criminal justice process be conducted in the most effective and least traumatic, intrusive, or intimidating manner.

77-37-2. Definitions.

In this chapter:

(1) "Child" means a person who is younger than 18 years of age, unless otherwise specified in statute. The rights to information as extended in this chapter also apply to the parents, custodian, or legal guardians of children.

(2) "Family member" means spouse, child, sibling, parent, grandparent, or legal guardian.

(3) "Victim" means a person against whom a crime has allegedly been committed, or against whom an act has allegedly been committed by a juvenile or incompetent adult, which would have been a crime if committed by a competent adult.

(4) "Witness" means any person who has been subpoenaed or is expected to be summoned to testify for the prosecution or who by reason of having relevant information is subject to call or likely to be called as a

witness for the prosecution, whether any action or proceeding has commenced.

77-37-3. Bill of Rights.

(1) The bill of rights for victims and witnesses is:

(a) Victims and witnesses have a right to be informed as to the level of protection from intimidation and harm available to them, and from what sources, as they participate in criminal justice proceedings as designated by Section 76-8-508, regarding witness tampering, and Section 76-8-509, regarding threats against a victim. Law enforcement, prosecution, and corrections personnel have the duty to timely provide this information in a form that is useful to the victim.

(b) Victims and witnesses, including children and their guardians, have a right to be informed and assisted as to their role in the criminal justice process. All criminal justice agencies have the duty to provide this information and assistance.

(c) Victims and witnesses have a right to clear explanations regarding relevant legal proceedings; these explanations shall be appropriate to the age of child victims and witnesses. All criminal justice agencies have the duty to provide these explanations.

(d) Victims and witnesses should have a secure waiting area that does not require them to be in close proximity to defendants or the family and friends of defendants. Agencies controlling facilities shall, whenever possible, provide this area.

(e) Victims are entitled to restitution or reparations, including medical costs, as provided in Title 63, Chapter 25a, Criminal Justice and Substance Abuse, and Sections 62A-7-109, 77-38a-302, and 77-27-6. State and local government agencies that serve victims have the duty to have a functional knowledge of the procedures established by the Utah Crime Victims' Reparations Board and to inform victims of these procedures.

(f) Victims and witnesses have a right to have any personal property returned as provided in Sections 77-24-1 through 77-24-5. Criminal justice agencies shall expeditiously return the property when it is no longer needed for court law enforcement or prosecution purposes.

(g) Victims and witnesses have the right to reasonable employer intercession services, including pursuing employer cooperation in minimizing employees' loss of pay and other benefits resulting from their participation in the criminal justice process. Officers of the court shall provide these services and shall consider victims' and witnesses' schedules so that activities which conflict can be avoided. Where conflicts cannot be avoided, the victim may request that the responsible agency intercede with employers or other parties.

(h) Victims and witnesses, particularly children, should have a speedy disposition of the entire criminal justice process. All involved public agencies shall establish policies and procedures to encourage speedy disposition of criminal cases.

(i) Victims and witnesses have the right to timely notice of judicial proceedings they are to attend and timely notice of cancellation of any proceedings. Criminal justice agencies have the duty to provide these notifications. Defense counsel and others have the duty to provide timely notice to prosecution of any continuances or other changes that may be required.

(j) Victims of sexual offenses have a right to be informed of their right to request voluntary testing for themselves for HIV infection as provided in Section 76-5-503 and to request mandatory testing of the convicted sexual offender for HIV infection as provided in Section 76-5-502. The law enforcement office where the sexual offense is reported shall have the responsibility to inform victims of this right.

(2) Informational rights of the victim under this chapter are based upon the victim providing his current address and telephone number to the criminal justice agencies involved in the case.

77-37-4. Additional rights -- Children.

In addition to all rights afforded to victims and witnesses under this chapter, child victims and witnesses shall be afforded these rights:

(1) Children have the right to protection from physical and emotional abuse during their involvement with the criminal justice process.

(2) Children are not responsible for inappropriate behavior adults commit against them and have the right not to be questioned, in any manner, nor to have allegations made, implying this responsibility. Those who interview children have the responsibility to consider the interests of the child in this regard.

(3) Child victims and witnesses have the right to have interviews relating to a criminal prosecution kept to a minimum. All agencies shall coordinate interviews and ensure that they are conducted by persons sensitive to the needs of children.

(4) Child victims have the right to be informed of available community resources that might assist them and how to gain access to those resources. Law enforcement and prosecutors have the duty to ensure that child victims are informed of community resources, including counseling prior to the court proceeding, and have those services available throughout the criminal justice process.

77-37-5. Remedies – Victims' Rights Committee.

(1) In each judicial district, the presiding district court judge shall appoint a person who shall establish and chair a victims' rights committee consisting of:

(a) a county attorney or district attorney;
(b) a sheriff;
(c) a corrections field services administrator;
(d) an appointed victim advocate;
(e) a municipal attorney;
(f) a municipal chief of police; and

(g) other representatives as appropriate.

(2) The committee shall meet at least semiannually to review progress and problems related to this chapter, Title 77, Chapter 38, Rights of Crime Victims Act, and Utah Constitution Article I, Section 28. Victims and other interested parties may submit matters of concern to the victims' rights committee. The committee may hold a hearing open to the public on any appropriate matter of concern and may publish its findings. These matters shall also be considered at the meetings of the victims' rights committee. The committee shall forward minutes of all meetings to the Commission on Criminal and Juvenile Justice and the Office of Crime Victim Reparations for review and other appropriate action.

(3) If a victims' rights committee is unable to resolve a complaint, it may refer the complaint to the Utah Council on Victims of Crime, established in Section 63-25a-601, for further consideration.

(4) The Office of Crime Victim Reparations shall provide materials to local law enforcement to inform every victim of a sexual offense of the right to request testing of the convicted sexual offender and of the victim as provided in Section 76-5-502.

(5) If a person acting under color of state law willfully or wantonly fails to perform duties so that the rights in this chapter are not provided, an action for injunctive relief may be brought against the individual and the government entity that employs the individual. The failure to provide the rights in this chapter or Title 77, Chapter 38, Rights of Crime Victims Act, does not constitute cause for a judgment against the state or any government entity, or any individual employed by the state or any government entity, for monetary damages, attorney's fees, or the costs of exercising any rights under this chapter.

(6) The person accused of and subject to prosecution for the crime or the act which would be a crime if committed by a competent adult, has no standing to make a claim concerning any violation of the provisions of this chapter.

Rights of Crime Victims Act (1994)

77-38-1. Title.

This act shall be known and may be cited as the "Rights of Crime Victims Act."

77-38-2. Definitions.

For the purposes of this chapter and the Utah Constitution:

(1) "Abuse" means treating the crime victim in a manner so as to injure, damage, or disparage.

(2) "Dignity" means treating the crime victim with worthiness, honor, and esteem.

(3) "Fairness" means treating the crime victim reasonably, even-handedly, and impartially.

(4) "Harassment" means treating the crime victim in a persistently annoying manner.

(5) "Important criminal justice hearings" or "important juvenile justice hearings" means the following proceedings in felony criminal cases or cases involving a minor's conduct which would be a felony if committed by an adult:

(a) any preliminary hearing to determine probable cause;

(b) any court arraignment where practical;

(c) any court proceeding involving the disposition of charges against a defendant or minor or the delay of a previously scheduled trial date but not including any unanticipated proceeding to take an admission or a plea of guilty as charged to all charges previously filed or any plea taken at an initial appearance;

(d) any court proceeding to determine whether to release a defendant or minor and, if so, under what conditions release may occur, excluding any such release determination made at an initial appearance;

(e) any criminal or delinquency trial, excluding any actions at the trial that a court might take in camera, in chambers, or at a sidebar conference;

(f) any court proceeding to determine the disposition of a minor or sentence, fine, or restitution of a defendant or to modify any disposition of a minor or sentence, fine, or restitution of a defendant; and

(g) any public hearing concerning whether to grant a defendant or minor parole or other form of discretionary release from confinement.

(6) "Reliable information" means information worthy of confidence, including any information whose use at sentencing is permitted by the United States Constitution.

(7) "Representative of a victim" means a person who is designated by the victim or designated by the court and who represents the victim in the best interests of the victim.

(8) "Respect" means treating the crime victim with regard and value.

(9) (a) "Victim of a crime" means any natural person against whom the charged crime or conduct is alleged to have been perpetrated or attempted by the defendant or minor personally or as a party to the offense or conduct or, in the discretion of the court, against whom a related crime or act is alleged to have been perpetrated or attempted, unless the natural person is the accused or appears to be accountable or otherwise criminally responsible for or criminally involved in the crime or conduct or a crime or act arising from the same conduct, criminal episode, or plan as the crime is defined under the laws of this state.

(b) For purposes of the right to be present, "victim of a crime" does not mean any person who is in custody as a pretrial detainee, as a prisoner following conviction for an offense, or as a juvenile who has committed an

act that would be an offense if committed by an adult, or who is in custody for mental or psychological treatment.

(c) For purposes of the right to be present and heard at a public hearing as provided in Subsection 77-38-2(5)(g) and the right to notice as provided in Subsection 77-38-3(7)(a), "victim of a crime" includes any victim originally named in the allegation of criminal conduct who is not a victim of the offense to which the defendant entered a negotiated plea of guilty.

77-38-3. Notification to victims -- Initial notice, election to receive subsequent notices -- Form of notice -- Protected victim information.

(1) Within seven days of the filing of felony criminal charges against a defendant, the prosecuting agency shall provide an initial notice to reasonably identifiable and locatable victims of the crime contained in the charges, except as otherwise provided in this chapter.

(2) The initial notice to the victim of a crime shall provide information about electing to receive notice of subsequent important criminal justice hearings listed in Subsections 77-38-2(5)(a) through (f) and rights under this chapter.

(3) The prosecuting agency shall provide notice to a victim of a crime for the important criminal justice hearings, provided in Subsections 77-38-2(5)(a) through (f) which the victim has requested.

(4) (a) The responsible prosecuting agency may provide initial and subsequent notices in any reasonable manner, including telephonically, electronically, orally, or by means of a letter or form prepared for this purpose.

(b) In the event of an unforeseen important criminal justice hearing, listed in Subsections 77-38-2(5)(a) through (f) for which a victim has requested notice, a good faith attempt to contact the victim by telephone shall be considered sufficient notice, provided that the prosecuting agency subsequently notifies the victim of the result of the proceeding.

(5) (a) The court shall take reasonable measures to ensure that its scheduling practices for the proceedings provided in Subsections 77-38-2(5)(a) through (f) permit an opportunity for victims of crimes to be notified.

(b) The court shall also consider whether any notification system that it might use to provide notice of judicial proceedings to defendants could be used to provide notice of those same proceedings to victims of crimes.

(6) A defendant or, if it is the moving party, Adult Probation and Parole, shall give notice to the responsible prosecuting agency of any motion for modification of any determination made at any of the important criminal justice hearings provided in Subsections 77-38-2(5)(a) through (f) in advance of any requested court hearing or action so that the prosecuting agency may comply with its notification obligation.

(7) (a) Notice to a victim of a crime shall be provided by the Board of Pardons and Parole for the important criminal justice hearing provided in Subsection 77-38-2(5)(g).

(b) The board may provide notice in any reasonable manner, including telephonically, electronically, orally, or by means of a letter or form prepared for this purpose.

(8) Prosecuting agencies and the Board of Pardons and Parole are required to give notice to a victim of a crime for the proceedings provided in Subsections 77-38-2(5)(a) through (f) only where the victim has responded to the initial notice, requested notice of subsequent proceedings, and provided a current address and telephone number if applicable.

(9) (a) Law enforcement and criminal justice agencies shall refer any requests for notice or information about crime victim rights from victims to the responsible prosecuting agency.

(b) In a case in which the Board of Pardons and Parole is involved, the responsible prosecuting agency shall forward any request for notice that it has received from a victim to the Board of Pardons and Parole.

(10) In all cases where the number of victims exceeds ten, the responsible prosecuting agency may send any notices required under this chapter in its discretion to a representative sample of the victims.

(11) (a) A victim's address, telephone number, and victim impact statement maintained by a peace officer, prosecuting agency, Youth Parole Authority, Division of Juvenile Justice Services, Department of Corrections, and Board of Pardons and Parole, for purposes of providing notice under this section, is classified as protected as provided in Subsection 63-2-304(10).

(b) The victim's address, telephone number, and victim impact statement is available only to the following persons or entities in the performance of their duties:

(i) a law enforcement agency, including the prosecuting agency;

(ii) a victims' right committee as provided in Section 77-37-5;

(iii) a governmentally sponsored victim or witness program;

(iv) the Department of Corrections;

(v) Office of Crime Victims' Reparations;

(vi) Commission on Criminal and Juvenile Justice; and

(vii) the Board of Pardons and Parole.

(12) The notice provisions as provided in this section do not apply to misdemeanors as provided in Section 77-38-5 and to important juvenile justice hearings as provided in Section 77-38-2.

77-38-4. Right to be present and to be heard -- Control of disruptive acts or irrelevant statements -- Statements from persons in custody.

(1) The victim of a crime shall have the right to be present at the important criminal or juvenile justice hearings provided in Subsections 77-38-2(5)(a) through (f), the right to be heard at the important criminal or juvenile justice hearings provided in Subsections 77-38-2(5)(b), (c), (d), and (f), and, upon request to the judge hearing the matter, the right to be present and heard at the initial appearance of the person suspected of committing the conduct or criminal offense against the victim on issues relating to whether to release a defendant or minor and, if so, under what conditions release may occur.

(2) This chapter shall not confer any right to the victim of a crime to be heard:

(a) at any criminal trial, including the sentencing phase of a capital trial under Section 76-3-207 or at any preliminary hearing, unless called as a witness; and

(b) at any delinquency trial or at any preliminary hearing in a minor's case, unless called as a witness.

(3) The right of a victim or representative of a victim to be present at trial is subject to Rule 615 of the Utah Rules of Evidence.

(4) Nothing in this chapter shall deprive the court of the right to prevent or punish disruptive conduct nor give the victim of a crime the right to engage in disruptive conduct.

(5) The court shall have the right to limit any victim's statement to matters that are relevant to the proceeding.

(6) In all cases where the number of victims exceeds five, the court may limit the in-court oral statements it receives from victims in its discretion to a few representative statements.

(7) Except as otherwise provided in this section, a victim's right to be heard may be exercised at the victim's discretion in any appropriate fashion, including an oral, written, audiotaped, or videotaped statement or direct or indirect information that has been provided to be included in any presentence report.

(8) If the victim of a crime is a person who is in custody as a pretrial detainee, as a prisoner following conviction for an offense, or as a juvenile who has committed an act that would be an offense if committed by an adult, or who is in custody for mental or psychological treatment, the right to be heard under this chapter shall be exercised by submitting a written statement to the court.

(9) The court may exclude any oral statement from a victim on the grounds of the victim's incompetency as provided in Rule 601(a) of Utah Rules of Evidence.

(10) Except in juvenile court cases, the Constitution may not be construed as limiting the existing rights of the prosecution to introduce evidence in support of a capital sentence.

77-38-5. Application to felonies and misdemeanors of the declaration of the rights of crime victims.

The provisions of this chapter shall apply to:

(1) any felony filed in the courts of the state;

(2) to any class A and class B misdemeanor filed in the courts of the state; and

(3) to cases in the juvenile court as provided in Section 78-3a-115.

77-38-6. Victim's right to privacy.

(1) The victim of a crime has the right, at any court proceeding, including any juvenile court proceeding, not to testify regarding the

victim's address, telephone number, place of employment, or other locating information unless the victim specifically consents or the court orders disclosure on finding that a compelling need exists to disclose the information. A court proceeding on whether to order disclosure shall be in camera.

(2) A defendant may not compel any witness to a crime, at any court proceeding, including any juvenile court proceeding, to testify regarding the witness's address, telephone number, place of employment, or other locating information unless the witness specifically consents or the court orders disclosure on finding that a compelling need for the information exists. A court proceeding on whether to order disclosure shall be in camera.

77-38-7. Victim's right to a speedy trial.

(1) In determining a date for any criminal trial or other important criminal or juvenile justice hearing, the court shall consider the interests of the victim of a crime to a speedy resolution of the charges under the same standards that govern a defendant's or minor's right to a speedy trial.

(2) The victim of a crime has the right to a speedy disposition of the charges free from unwarranted delay caused by or at the behest of the defendant or minor and to prompt and final conclusion of the case after the disposition or conviction and sentence, including prompt and final conclusion of all collateral attacks on dispositions or criminal judgments.

(3) (a) In ruling on any motion by a defendant or minor to continue a previously established trial or other important criminal or juvenile justice hearing, the court shall inquire into the circumstances requiring the delay and consider the interests of the victim of a crime to a speedy disposition of the case.

(b) If a continuance is granted, the court shall enter in the record the specific reason for the continuance and the procedures that have been taken to avoid further delays.

77-38-8. Age-appropriate language at judicial proceedings -- Advisor.

(1) In any criminal proceeding or juvenile court proceeding regarding or involving a child, examination and cross-examination of a victim or witness 13 years of age or younger shall be conducted in age-appropriate language.

(2) (a) The court may appoint an advisor to assist a witness 13 years of age or younger in understanding questions asked by counsel.

(b) The advisor is not required to be an attorney.

77-38-9. Representative of victim -- Court designation -- Representation in cases involving minors -- Photographs in homicide cases.

(1) (a) A victim of a crime may designate, with the approval of the court, a representative who may exercise the same rights that the victim is entitled to exercise under this chapter.

(b) Except as otherwise provided in this section, the victim may revoke the designation at any time.

(c) In cases where the designation is in question, the court may require that the designation of the representative be made in writing by the victim.

(2) In cases in which the victim is deceased or incapacitated, upon request from the victim's spouse, parent, child, or close friend, the court shall designate a representative or representatives of the victim to exercise the rights of a victim under this chapter on behalf of the victim. The responsible prosecuting agency may request a designation to the court.

(3) (a) If the victim is a minor, the court in its discretion may allow the minor to exercise the rights of a victim under this chapter or may allow the victim's parent or other immediate family member to act as a representative of the victim.

(b) The court may also, in its discretion, designate a person who is not a member of the immediate family to represent the interests of the minor.

(4) The representative of a victim of a crime shall not be:

(a) the accused or a person who appears to be accountable or otherwise criminally responsible for or criminally involved in the crime or conduct, a related crime or conduct, or a crime or act arising from the same conduct, criminal episode, or plan as the crime or conduct is defined under the laws of this state;

(b) a person in the custody of or under detention of federal, state, or local authorities; or

(c) a person whom the court in its discretion considers to be otherwise inappropriate.

(5) Any notices that are to be provided to a victim pursuant to this chapter shall be sent to the victim or the victim's lawful representative.

(6) On behalf of the victim, the prosecutor may assert any right to which the victim is entitled under this chapter, unless the victim requests otherwise or exercises his own rights.

(7) In any homicide prosecution, the prosecution may introduce a photograph of the victim taken before the homicide to establish that the victim was a human being, the identity of the victim, and for other relevant purposes.

77-38-10. Victim's discretion.

(1) (a) The victim may exercise any rights under this chapter at his discretion to be present and to be heard at a court proceeding, including a juvenile delinquency proceeding.

(b) The absence of the victim at the court proceeding does not preclude the court from conducting the proceeding.

(2) A victim shall not refuse to comply with an otherwise lawful subpoena under this chapter.

(3) A victim shall not prevent the prosecution from complying with requests for information within a prosecutor's possession and control under this chapter.

77-38-11. Enforcement -- Appellate Review -- No right to money damages.

(1) If a person acting under color of state law willfully or wantonly fails to perform duties so that the rights in this chapter are not provided, an action for injunctive relief, including prospective injunctive relief, may be brought against the individual and the governmental entity that employs the individual.

(2) (a) The victim of a crime or representative of a victim of a crime, including any Victims' Rights Committee as defined in Section 77-37-5 may:

(i) bring an action for declaratory relief or for a writ of mandamus defining or enforcing the rights of victims and the obligations of government entities under this chapter; and

(ii) petition to file an amicus brief in any court in any case affecting crime victims.

(b) Adverse rulings on these actions or on a motion or request brought by a victim of a crime or a representative of a victim of a crime may be appealed under the rules governing appellate actions, provided that no appeal shall constitute grounds for delaying any criminal or juvenile proceeding.

(c) An appellate court shall review all such properly presented issues, including issues that are capable of repetition but would otherwise evade review.

(3) The failure to provide the rights in this chapter or Title 77, Chapter 37, Victims Rights, shall not constitute cause for a judgment against the state or any government entity, or any individual employed by the state or any government entity, for monetary damages, attorneys' fees, or the costs of exercising any rights under this chapter.

77-38-12. Construction of this chapter -- No right to set aside conviction, adjudication, admission, or plea -- Severability clause.

(1) All of the provisions contained in this chapter shall be construed to assist the victims of crime.

(2) This chapter may not be construed as creating a basis for dismissing any criminal charge or delinquency petition, vacating any adjudication or conviction, admission or plea of guilty or no contest, or for appellate, habeas corpus, except in juvenile cases, or other relief from a judgment in any criminal or delinquency case.

(3) This chapter may not be construed as creating any right of a victim to appointed counsel at state expense.

(4) All of the rights contained in this chapter shall be construed to conform to the Constitution of the United States.

(5) (a) In the event that any portion of this chapter is found to violate the Constitution of the United States, the remaining provisions of this chapter shall continue to operate in full force and effect.

(b) In the event that a particular application of any portion of this chapter is found to violate the Constitution of the United States, all other applications shall continue to operate in full force and effect.

(6) The enumeration of certain rights for crime victims in this chapter shall not be construed to deny or disparage other rights granted by the Utah Constitution or the Legislature or retained by victims of crimes.

77-38-13. Declaration of legislative authority.

It is the view of the Legislature that the provisions of this chapter, and other provisions enacted simultaneously with it, are substantive provisions within inherent legislative authority. In the event that any of the provisions of this chapter, and other provisions enacted simultaneously with it, are interpreted to be procedural in nature, the Legislature also intends to invoke its powers to modify procedural rules under the Utah Constitution.

77-38-14. Notice of expungement petition -- Victim's right to object.

(1) The Department of Corrections or the Juvenile Probation Department shall prepare a document explaining the right of a victim or a victim's representative to object to a petition for expungement under Section 77-18-11 or 78-3a-905 and the procedures for obtaining notice of any such petition. The department or division shall also provide each trial court a copy of the document which has jurisdiction over delinquencies or criminal offenses subject to expungement.

(2) The prosecuting attorney in any case leading to a conviction or an adjudication subject to expungement shall provide a copy of the document to each person who would be entitled to notice of a petition for expungement under Sections 77-18-11 and 78-3a-905.

Crime Victims Restitution Act (2001)

77-38a-101. Title.

This chapter is known as the "Crime Victims Restitution Act."

77-38a-102. Definitions.

As used in this chapter:

(1) "Conviction" includes a:

(a) judgment of guilt;

(b) a plea of guilty; or

(c) a plea of no contest.

(2) "Criminal activities" means any offense of which the defendant is convicted or any other criminal conduct for which the defendant admits responsibility to the sentencing court with or without an admission of committing the criminal conduct.

(3) "Department" means the Department of Corrections.

(4) "Diversion" means suspending criminal proceedings prior to conviction on the condition that a defendant agree to participate in a rehabilitation program, make restitution to the victim, or fulfill some other condition.

(5) "Party" means the prosecutor, defendant, or department involved in a prosecution.

(6) "Pecuniary damages" means all demonstrable economic injury, whether or not yet incurred, which a person could recover in a civil action arising out of the facts or events constituting the defendant's criminal activities and includes the fair market value of property taken, destroyed, broken, or otherwise harmed, and losses including lost earnings and

medical expenses, but excludes punitive or exemplary damages and pain and suffering.

(7) "Plea agreement" means an agreement entered between the prosecution and defendant setting forth the special terms and conditions and criminal charges upon which the defendant will enter a plea of guilty or no contest.

(8) "Plea in abeyance" means an order by a court, upon motion of the prosecution and the defendant, accepting a plea of guilty or of no contest from the defendant but not, at that time, entering judgment of conviction against him nor imposing sentence upon him on condition that he comply with specific conditions as set forth in a plea in abeyance agreement.

(9) "Plea in abeyance agreement" means an agreement entered into between the prosecution and the defendant setting forth the specific terms and conditions upon which, following acceptance of the agreement by the court, a plea may be held in abeyance.

(10) "Plea disposition" means an agreement entered into between the prosecution and defendant including diversion, plea agreement, plea in abeyance agreement, or any agreement by which the defendant may enter a plea in any other jurisdiction or where charges are dismissed without a plea.

(11) "Restitution" means full, partial, or nominal payment for pecuniary damages to a victim, including prejudgment interest, the accrual of interest from the time of sentencing, insured damages, reimbursement for payment of a reward, and payment for expenses to a governmental entity for extradition or transportation and as may be further defined by law.

(12) (a) "Reward" means a sum of money:

(i) offered to the public for information leading to the arrest and conviction of an offender; and

(ii) that has been paid to a person or persons who provide this information, except that the person receiving the payment may not be a codefendant, an accomplice, or a bounty hunter.

(b) "Reward" does not include any amount paid in excess of the sum offered to the public.

(13) "Screening" means the process used by a prosecuting attorney to terminate investigative action, proceed with prosecution, move to dismiss a prosecution that has been commenced, or cause a prosecution to be diverted.

(14) (a) "Victim" means any person whom the court determines has suffered pecuniary damages as a result of the defendant's criminal activities.

(b) "Victim" may not include a codefendant or accomplice.

77-38a-201. Restitution determination -- Law enforcement duties and responsibilities.

Any law enforcement agency conducting an investigation for criminal conduct which would constitute a felony or class A misdemeanor shall provide in the investigative reports whether a claim for restitution exists, the basis for the claim, and the estimated or actual amount of the claim.

77-38a-202. Restitution determination -- Prosecution duties and responsibilities.

(1) At the time of entry of a conviction or entry of any plea disposition of a felony or class A misdemeanor, the attorney general, county attorney, municipal attorney, or district attorney shall provide to the district court:

(a) the names of all victims, including third parties, asserting claims for restitution;

(b) the actual or estimated amount of restitution determined at that time; and

(c) whether or not the defendant has agreed to pay the restitution specified as part of the plea disposition.

(2) In computing actual or estimated restitution, the attorney general, county attorney, municipal attorney, or district attorney shall:

(a) use the criteria set forth in Section 77-38a-302 for establishing restitution amounts; and

(b) in cases involving multiple victims, incorporate into any conviction or plea disposition all claims for restitution arising out of the investigation for which the defendant is charged.

(3) If charges are not to be prosecuted as part of a plea disposition, restitution claims from victims of those crimes shall also be provided to the court.

77-38a-203. Restitution determination -- Department of Corrections -- Presentence investigation.

(1) (a) The department shall prepare a presentence investigation report in accordance with Subsection 77-18-1(5). The prosecutor and law enforcement agency involved shall provide all available victim information to the department upon request. The victim impact statement shall:

(i) identify all victims of the offense;

(ii) itemize any economic loss suffered by the victim as a result of the offense;

(iii) include for each identifiable victim a specific statement of the recommended amount of complete restitution as defined in Section 77-38a-302, accompanied by a recommendation from the department regarding

the payment by the defendant of court-ordered restitution with interest as defined in Section 77-38a-302;

(iv) identify any physical, mental, or emotional injuries suffered by the victim as a result of the offense, and the seriousness and permanence;

(v) describe any change in the victim's personal welfare or familial relationships as a result of the offense;

(vi) identify any request for mental health services initiated by the victim or the victim's family as a result of the offense; and

(vii) contain any other information related to the impact of the offense upon the victim or the victim's family that the court requires.

(b) The crime victim shall be responsible to provide to the department upon request all invoices, bills, receipts, and other evidence of injury, loss of earnings, and out-of-pocket loss. The crime victim shall also provide upon request:

(i) all documentation and evidence of compensation or reimbursement from insurance companies or agencies of the state of Utah, any other state, or federal government received as a direct result of the crime for injury, loss, earnings, or out-of-pocket loss; and

(ii) proof of identification, including date of birth, Social Security number, drivers license number, next of kin, and home and work address and telephone numbers.

(c) The inability, failure, or refusal of the crime victim to provide all or part of the requested information shall result in the court determining restitution based on the best information available.

(2) (a) The court shall order the defendant as part of the presentence investigation to submit to the department any information determined necessary to be disclosed for the purpose of ascertaining the restitution.

(b) The willful failure or refusal of the defendant to provide all or part of the requisite information shall constitute a waiver of any grounds to appeal or seek future amendment or alteration of the restitution order predicated on the undisclosed information.

(c) If the defendant objects to the imposition, amount, or distribution of the restitution recommended in the presentence investigation, the court shall set a hearing date to resolve the matter.

(d) If any party fails to challenge the accuracy of the presentence investigation report at the time of sentencing, that matter shall be considered to be waived.

77-38a-301. Restitution -- Convicted defendant may be required to pay.

In a criminal action, the court may require a convicted defendant to make restitution.

77-38a-302. Restitution criteria.

(1) When a defendant is convicted of criminal activity that has resulted in pecuniary damages, in addition to any other sentence it may impose, the court shall order that the defendant make restitution to victims of crime as provided in this chapter, or for conduct for which the defendant has agreed to make restitution as part of a plea disposition. For purposes of restitution, a victim has the meaning as defined in Subsection 77-38a-102(14) and in determining whether restitution is appropriate, the court shall follow the criteria and procedures as provided in Subsections (2) through (5).

(2) In determining restitution, the court shall determine complete restitution and court-ordered restitution.

(a) "Complete restitution" means restitution necessary to compensate a victim for all losses caused by the defendant.

(b) "Court-ordered restitution" means the restitution the court having criminal jurisdiction orders the defendant to pay as a part of the criminal sentence at the time of sentencing or within one year after sentencing.

(c) Complete restitution and court-ordered restitution shall be determined as provided in Subsection (5).

(3) If the court determines that restitution is appropriate or inappropriate under this part, the court shall make the reasons for the decision part of the court record.

(4) If the defendant objects to the imposition, amount, or distribution of the restitution, the court shall allow the defendant a full hearing on the issue.

(5) (a) For the purpose of determining restitution for an offense, the offense shall include any criminal conduct admitted by the defendant to the sentencing court or to which the defendant agrees to pay restitution. A victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity, includes any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(b) In determining the monetary sum and other conditions for complete restitution, the court shall consider all relevant facts, including:

(i) the cost of the damage or loss if the offense resulted in damage to or loss or destruction of property of a victim of the offense;

(ii) the cost of necessary medical and related professional services and devices relating to physical or mental health care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(iii) the cost of necessary physical and occupational therapy and rehabilitation;

(iv) the income lost by the victim as a result of the offense if the offense resulted in bodily injury to a victim;

(v) up to five days of the individual victim's determinable wages that are lost due to theft of or damage to tools or equipment items of a trade that were owned by the victim and were essential to the victim's current employment at the time of the offense; and

(vi) the cost of necessary funeral and related services if the offense resulted in the death of a victim.

(c) In determining the monetary sum and other conditions for court-ordered restitution, the court shall consider the factors listed in Subsections (5)(a) and (b) and:

(i) the financial resources of the defendant and the burden that payment of restitution will impose, with regard to the other obligations of the defendant;

(ii) the ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court;

(iii) the rehabilitative effect on the defendant of the payment of restitution and the method of payment; and

(iv) other circumstances which the court determines may make restitution inappropriate.

(d) (i) Except as provided in Subsection (5)(d)(ii), the court shall determine complete restitution and court-ordered restitution, and shall make all restitution orders at the time of sentencing if feasible, otherwise within one year after sentencing.

(ii) Any pecuniary damages that have not been determined by the court within one year after sentencing may be determined by the Board of Pardons and Parole.

(e) The Board of Pardons and Parole may, within one year after sentencing, refer an order of judgment and commitment back to the court for determination of restitution.

77-38a-401. Entry of judgment -- Interest -- Civil actions -- Lien.

(1) Upon the court determining that a defendant owes restitution, the clerk of the court shall enter an order of complete restitution as defined in Section 77-38a-302 on the civil judgment docket and provide notice of the order to the parties.

(2) The order shall be considered a legal judgment, enforceable under the Utah Rules of Civil Procedure. In addition, the department may, on behalf of the person in whose favor the restitution order is entered, enforce the restitution order as judgment creditor under the Utah Rules of Civil Procedure.

(3) If the defendant fails to obey a court order for payment of restitution and the victim or department elects to pursue collection of the order by civil process, the victim shall be entitled to recover reasonable attorney's fees.

(4) A judgment ordering restitution when recorded in a registry of judgments docket shall have the same affect and is subject to the same rules as a judgment in a civil action. Interest shall accrue on the amount ordered from the time of sentencing, including prejudgment interest.

(5) The department shall make rules permitting the restitution payments to be credited to principal first and the remainder of payments credited to interest in accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act.

77-38a-402. Nondischargeability in bankruptcy.

Restitution imposed under this chapter and interest accruing in accordance with Subsection 77-38a-401(4) is considered a debt and may not be discharged in bankruptcy.

77-38a-403. Civil action by victim for damages.

(1) Provisions in this part concerning restitution do not limit or impair the right of a person injured by a defendant's criminal activities to sue and recover damages from the defendant in a civil action. Evidence that the defendant has paid or been ordered to pay restitution under this part may not be introduced in any civil action arising out of the facts or events which were the basis for the restitution. However, the court shall credit any restitution paid by the defendant to a victim against any judgment in favor of the victim in the civil action.

(2) If conviction in a criminal trial necessarily decides the issue of a defendant's liability for pecuniary damages of a victim, that issue is conclusively determined as to the defendant if it is involved in a subsequent civil action.

77-38a-404. Priority.

(1) Restitution payments made pursuant to a court order shall be disbursed to victims within 60 days of receipt from the defendant by the court or department:

(a) provided the victim has complied with Subsection 77-38a-203(1)(b); and

(b) if the defendant has tendered a negotiable instrument, funds from the financial institution are actually received.

(2) If restitution to more than one person, agency, or entity is required at the same time, the department shall establish the following priorities of payment, except as provided in Subsection (4):

(a) the crime victim;

(b) the Office of Crime Victim Reparations;

(c) any other government agency which has provided reimbursement to the victim as a result of the offender's criminal conduct;

(d) the person, entity, or governmental agency that has offered and paid a reward under Section 76-3-201.1 or 78-3a-118;

(e) any insurance company which has provided reimbursement to the victim as a result of the offender's criminal conduct; and

(f) any county correctional facility to which the defendant is required to pay restitution under Subsection 76-3-201(6).

(3) Restitution ordered under Subsection (2)(f) is paid after criminal fines and surcharges are paid.

(4) If the offender is required under Section 53-10-404 to reimburse the department for the cost of obtaining the offender's DNA specimen, this reimbursement is the next priority after restitution to the crime victim under Subsection (2)(a).

(5) All money collected for court-ordered obligations from offenders by the department will be applied:

(a) first, to victim restitution, except the current and past due amount of $30 per month required to be collected by the department under Section 64-13-21, if applicable; and

(b) second, if applicable, to the cost of obtaining a DNA specimen under Subsection (4).

(6) Restitution owed to more than one victim shall be disbursed to each victim according to the percentage of each victim's share of the total restitution order.

77-38a-501. Default and sanctions.

(1) When a defendant defaults in the payment of a judgment for restitution or any installment ordered, the court, on motion of the prosecutor, parole or probation agent, victim, or on its own motion may impose sanctions against the defendant as provided in Section 76-3-201.1.

(2) The court may not impose a sanction against the defendant under Subsection (1) if:

(a) the defendant's sole default in the payment of a judgement for restitution is the failure to pay restitution ordered under Subsection 76-3-201(6) regarding costs of incarceration in a county correctional facility; and

(b) the sanction would extend the defendant's term of probation or parole.

77-38a-502. Collection from inmate offenders.

In addition to the remedies provided in Section 77-38a-501, the department upon written request of the prosecutor, victim, or parole or probation agent, shall collect restitution from offender funds held by the department as provided in Section 64-13-23.

77-38a-601. Preservation of assets.

(1) At the time a criminal information, indictment charging a violation, or a petition alleging delinquency is filed, or at any time during the prosecution of the case, a prosecutor may petition the court to enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property which may be necessary to satisfy an anticipated restitution order if, in the prosecutor's best judgement, there is a substantial likelihood that a conviction will be obtained and restitution will be ordered.

(a) Upon receiving a petition from a prosecutor under this Subsection (1), and after notice and a hearing, the court may enter a restraining order

or injunction, require the execution of a satisfactory performance bond, or take any action necessary to preserve the availability of property which may be necessary to satisfy an anticipated restitution order.

(b) An order entered under this Subsection (1) is effective for up to 90 days, unless extended by the court for good cause shown.

(2) Prior to the filing of a criminal information, indictment charging a violation, or a petition alleging delinquency, a prosecutor may petition the court to enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property which may be necessary to satisfy an anticipated restitution order if, in the prosecutor's best judgement, there is a substantial likelihood that a conviction will be obtained and restitution will be ordered.

(a) Upon receiving a request from a prosecutor under this Subsection (2), the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any action necessary to preserve the availability of property which may be necessary to satisfy an anticipated restitution order after notice to persons appearing to have an interest in the property and affording them an opportunity to be heard, if the court determines that:

(i) there is probable cause to believe that a crime has been committed and that the defendant committed it, and that failure to enter the order will result in the property being sold, distributed, exhibited, destroyed, or removed from the jurisdiction of the court, or otherwise be made unavailable for restitution; and

(ii) the need to preserve the availability of the property or prevent its sale, distribution, exhibition, destruction, or removal through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered.

(b) An order entered under this Subsection (2) is effective for the period of time given in the order.

(3) (a) Upon receiving a request from a prosecutor under Subsection (2), and notwithstanding Subsection (2)(a)(i), a court may enter a temporary restraining order against an owner with respect to specific property without notice or opportunity for a hearing if:

(i) the prosecutor demonstrates that there is a substantial likelihood that the property with respect to which the order is sought appears to be necessary to satisfy an anticipated restitution order under this chapter; and

(ii) that provision of notice would jeopardize the availability of the property to satisfy any restitution order or judgment.

(b) The temporary order in this Subsection (3) expires not more than ten days after it is entered unless extended for good cause shown or the party against whom it is entered consents to an extension.

(4) A hearing concerning an order entered under this section shall be held as soon as possible, and prior to the expiration of the temporary order.

Utah Rules of Criminal Procedure

Rule 35. Victims and witnesses.

(a) The prosecuting agency shall inform all victims and subpoenaed witnesses of their responsibilities during the criminal proceedings.

(b) The prosecuting agency shall inform all victims and subpoenaed witnesses of their right to be free from threats, intimidation and harm by anyone seeking to induce the victim or witness to testify falsely, withhold testimony or information, avoid legal process, or secure the dismissal of or prevent the filing of a criminal complaint, indictment or information.

(c) If requested by the victim, the prosecuting agency shall provide notice to all victims of the date and time of scheduled hearings, trial and sentencing and of their right to be present during those proceedings and any other public hearing unless they are subpoenaed to testify as a witness and the exclusionary rule is invoked.

(d) The informational rights of victims and witnesses contained in paragraphs (a) through (c) of this rule are contingent upon their providing the prosecuting agency and court with their current telephone numbers and addresses.

(e) In cases where the victim or the victim's legal guardian so requests, the prosecutor shall explain to the victim that a plea agreement involves the dismissal or reduction of charges in exchange for a plea of guilty and identify the possible penalties which may be imposed by the court upon acceptance of the plea agreement. At the time of entry of the plea, the prosecutor shall represent to the court, either in writing or on the record, that the victim has been contacted and an explanation of the plea bargain has been provided to the victim or the victim's legal guardian prior to the court's acceptance of the plea. If the victim or the victim's legal guardian has informed the prosecutor that he or she wishes to address the court at the change of plea or sentencing hearing, the prosecutor shall so inform the court.

(f) The court shall not require victims and witnesses to state their addresses and telephone numbers in open court.

(g) Judges should give scheduling priority to those criminal cases where the victim is a minor in an effort to minimize the emotional trauma to the victim. Scheduling priorities for cases involving minor victims are subject to the scheduling priorities for criminal cases where the defendant is in custody.

Addendum B

IN THE EIGHTH JUDICIAL DISTRICT COURT
IN AND FOR DUCHESNE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. BRANDON R. LANE, Defendant.	RULING AND ORDER Case No. 051800048 Judge JOHN R. ANDERSON

This matter is before the Court on victims Patricia Hay's and Peggy Hay's ("the victims") Motion to Set Aside Plea in Abeyance and for Evidentiary Hearing, filed August 03, 2006. On July 31, 2006, the Court convened a telephone conference. The Court requested that the parties brief the issue of whether the victims have standing to assert a motion to set aside the plea and a time frame for such briefing was established. On August 23, 2006, the victims filed a memorandum in support of the motion to set aside the plea. On September 11, 2006, the Defendant filed a reply memorandum in opposition to the motion. On October 23, 2006, the victims submitted a reply memorandum in support of the motion. The Court notes that this reply was submitted more than one month after the deadline established at the July 31 telephone conference. The Court also notes that the Plaintiff has remained silent in the matter. Having considered the briefs, the Court now rules upon the issue of standing and upon the merits of the arguments presented in the briefs.

I. STANDING

After reviewing the matter, the Court finds that the victims have standing to file their motion. The Court finds standing, in part, due to the similarity of this case with State v. Casey, 2002 UT 29, 44 P.3d 756, which was cited by both parties. In Casey, the Supreme Court of Utah entertained an appeal by the mother of a victim of sexual abuse. While the Supreme Court did not directly discuss the issue of standing in Casey, the Supreme Court has stated that "standing [is] a threshold issue that must be determined before proceeding to further inquiries." Provo City Corp. v. Thompson, 2004

UT 14, P8 (Utah 2004). From this Court's review of that decision, the Supreme Court presumed that the victim had standing to file the motion to set aside the plea.

Due to the similarity of these cases, this Court will find that the victims have standing to assert a similar motion to set aside the plea. The Court feels confident that this is the correct course of action in light of the fact that the victims are seeking relief based upon constitutional and statutory rights, no other party has as great an interest in seeking to set aside the plea and to obtain review of this Court's restitution order, and no other party is seeking to raise these issues. The Court is particularly concerned that the victims be afforded the fairness, respect, and dignity contemplated by Section 28 of Article I of the Constitution of Utah. Based upon the foregoing, the Court will rule that the victims have standing insofar as the victims are attempting to assert rights arising under the Utah Constitution and Utah Code.

II. THE VICTIMS' MOTION TO SET ASIDE THE PLEA

For the reasons that follow, the Court will deny the motion to set aside the plea, but will convene a hearing for presentation of victim impact statements.

A. RIGHT TO BE PRESENT AND HEARD

The victims argue that Article I, Section 28 of the Utah Constitution and Utah Code Ann. § 77-38-4(1) grant victims a right to be present and heard at important criminal justice hearings. The victims argue that the September 12, 2005 status hearing, at which the plea in abeyance was entered, is a hearing at which they had a right to be present and heard. Utah Code Ann. § 77-38-2(5) defines "important criminal justice hearings," for purposes of the Utah Constitution and for purposes of that chapter, as certain hearing related to felony proceedings (accord Utah Const., Art. I, Sec. 28(3)). Because this case has never involved any felonies, the Court is obligated to find that Utah constitutional and statutory law did not provide the victims with the right to be present and heard at the September 12, 2005 hearing. This finding is consistent with the Utah Supreme Court's plain language interpretation of the relevant statutes in State v. Casey, 2002 UT 29, 44 P.3d 756.

That said, the Court, in an attempt to provide the victims with the fairness, respect, and dignity contemplated by the Utah Constitution, will schedule a hearing at which, should the victims

desire, victim impact statements may be presented.

B. RESTITUTION

After reviewing the memoranda, the Court is unable to determine the proper course of action to take as it relates to the issue of restitution. Utah Code Ann. § 77-37-3(1)(e) states unequivocally that "Victims are entitled to restitution . . ." The procedure for determining the proper amount of restitution is outlined in Title 77 , Chapter 38a of the Utah Code. Having reviewed the procedures, and having reviewed the transcript from the September 12, 2005 hearing, the Court is concerned that the procedural requirements relating to the proper determination of restitution were not met.

However, the State has agreed, as part of the plea in abeyance agreement, to not seek additional restitution for the events that transpired on February 19, 2005. There is no private cause of action that the Court has been made aware of for seeking restitution above and beyond that requested by the State. Further, the Defendant has indicated that the victims have entered into a settlement with the Defendant and the Defendant's insurer, which settlement bars any future claims against the Defendant. Because the State has agreed to not seek additional restitution, and because it appears that the victims cannot seek additional restitution from the Defendant, the Court cannot see how anyone is in a position to further enforce the victims' right to restitution. Therefore, the Court will deny the victims' request for a restitution hearing.

ORDER

Therefore, based upon the foregoing, the Court finds that the victims have standing, but that IT IS HEREBY ORDERED that the victims' motion is DENIED. The Court orders that a hearing be held at which the victims, if so desired, can present statements regarding the impact of the Defendant's actions on the victims' lives. The Court orders that the Defendant be present at the hearing. This is done to afford the victims the fairness, respect, and dignity contemplated by the Utah Constitution.

Dated this 31st day of Oct, 2005.

BY THE COURT:

JOHN R. ANDERSON, District Court Judge

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 051800048 by the method and on the date specified.

METHOD	NAME
Mail	ROBERT P FAUST ATTORNEY DEF 4132 S 2300 E SALT LAKE CITY, UT 84124
Mail	HEIDI M NESTEL ATTORNEY 2035 S 1300 E SALT LAKE CITY UT 84105
By Hand	KAREN ALLEN

Dated this 10th day of November, 2006.

Deputy Court Clerk

Addendum C

JAMES H. FAUST - #1046
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IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT IN AND FOR THE COUNTY OF DUCHESNE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, vs. BRANDON R. LANE, Defendant, Peggy Hay and Patricia Hay, Victims.	)	**ORDER ALLOWING WITHDRAWAL OF GUILTY PLEA AND ORDER OF DISMISSAL WITH PREJUDICE** Case No. 051800048 Judge John R. Anderson

The above matter came before the court on Monday, August 27, 2007 before the above-entitled court pursuant to Defendant Brandon Lane's Motion to Dismiss seeking an order setting aside the Defendant's guilty plea. Memoranda having been filed by Defendant's attorney, James H. Faust, and the Victims' advocate, Heidi Nestel, the court having heard oral argument, now enters into the following Findings of Fact and Order:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On or about September 12, 2005, Defendant Brandon Lane pleaded guilty to two counts of misdemeanor negligent homicide, and two counts of misdemeanor illegal lane change. Pursuant to the joint motions of both the defense and prosecution, this Court agreed to hold the pleas in abeyance as governed by the written plea in abeyance agreement. According to the

terms set therein, Defendant agreed to commit no new violations of law for 12 months, pay a $1,500.00 plea in abeyance fee, complete 44 hours of community service and complete a defensive driving course. The Court then informed Defendant that if he performed all of these obligations, that at the expiration of 12 months the Court would allow Defendant to withdraw his guilty pleas and have the case dismissed with prejudice.

2. Within the agreed 12-month period, Defendant fully performed each of his obligations imposed by the court and duly provided proof of the Defendant's compliance to this Court as well.

3. Prior to the expiration of the 12 months, in August of 2006, surviving Victims Peggy and Patricia Hay, by and through counsel, filed a Motion to Set Aside the Plea in Abeyance. Subsequent to filing this motion, Victims filed a motion to stay the plea in abeyance period so that the parties could brief and argue Victims' Motion to Set Aside the Plea in Abeyance. The Court granted the motion to stay the abeyance period so that Victims could be heard.

4. In October of 2006, this Court, having received Victims' expansive brief and Defendant's opposition, denied Victims' Motion to Set Aside the Plea in Abeyance. However, the Court agreed to stay the abeyance period to allow Victims the opportunity to appeal this Court's denial of their motion.

5. In December of 2006, Victims filed their appeal with the Court of Appeals.

6. March 12, 2007 marked the passing of 18 months since this Court held the misdemeanor pleas in abeyance.

7. Utah Code Ann. § 77-2a-2(5) provides that "A plea shall not be held in abeyance longer than 18 months if the plea was to any class of misdemeanor or longer than three years if

the plea was to any degree of felony or to any combination of misdemeanors and felonies." The Court finds that a plea to multiple misdemeanors held in abeyance can only be held for a period no longer than 18 months.

8. Utah Code Ann. §77-38-11(2)(b) gives victims the right to appeal adverse rulings made by the trial court. However, this statute also explicitly states that no appeal "shall constitute grounds for delaying any criminal or juvenile proceeding."

9. Victims' failure, by and through counsel, to receive an order from an appellate court overturning the trial court's decision to deny Victims' Motion to Set Aside the Plea In Abeyance Agreement within that eighteen month window of time amounts to a delay of the underlying case.

ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That insofar as Utah law lacked jurisdiction, pursuant to State v. Schubarth, 2005 UT App. 166, to stay a plea in abeyance agreement beyond the statutory time limitation and under Utah Law - Utah Code Ann. §77-2a2(5) - the Court is prevented from holding multiple misdemeanor pleas in abeyance for longer than 18 months, the court hereby orders the dismissal of Defendant's guilty pleas, with prejudice.

DATED this 5 day of Nov., 2007.

BY THE COURT:

JOHN ANDERSON, DISTRICT COURT JUDGE

Addendum D

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Attorney for Defendant

IN THE EIGHTH DISTRICT COURT OF THE STATE OF UTAH

DUCHESNE COUNTY, DUCHESNE DEPARTMENT

STATE OF UTAH, Plaintiff, v. BRANDON RAY LANE DOB: 08/16/1978 Defendant.	)	PLEA IN ABEYANCE AGREEMENT Case No. 05-1800048 Judge John R. Anderson

This Plea in Abeyance Agreement is made and entered into this 12th day of September, 2005, by the between the Plaintiff, State of Utah, through its attorney, Karen Allen, and the Defendant, Brandon Ray Lane and his attorney of record, Robert P. Faust, in the above-entitled action, pursuant to Utah Code Ann. §77-2a-1 through 4.

IT IS HEREBY AGREED AS FOLLOWS:

1. The State agrees it will not bring any other charges or actions for restitution against Defendant for his activities described in the Summons/Information or for the events related to automobile accident of February 19, 2005.

2. Defendant shall plead guilty to two counts of Negligent Homicide, a Class A Misdemeanor, pursuant to Utah Code Annotated §76-5-206 (1953), and to two Class C Misdemeanors in violation of Section 41-6a-706 (1) and violation of Section 41-6a-706 (2), as amended, and the State shall make a Motion that Defendant's pleas of guilty be held in abeyance for a period of twelve (12) months.

3. Defendant acknowledges that he will plead guilty to two counts of Negligent Homicide, a Class A Misdemeanor, pursuant to Utah Code Annotated §76-5-206 (1953), as amended and two Class C Misdemeanors in violation of Section 41-6a-706 (1) and (2) as amended, if the Judge indicates he will accept this plea in abeyance. Defendant further acknowledges that each Class A Misdemeanor carries a maximum sentence of not more than 1 year imprisonment and a $2,500 fine (plus an 85% surcharge under Utah Code Ann. §63-63a-1) and each Class C Misdemeanor carries a maximum sentence of not more than ninety days imprisonment and a $750.00 fine (plus an 85% surcharge under Utah Code Ann. §63-63a-1).

4. Defendant acknowledges that by pleading guilty, he is admitting each element of the offenses.

5. Defendant acknowledges that he understands that by pleading guilty he waives or gives up the following rights:

a. The right to a speedy trial before an impartial jury;

b. The right to voluntarily testify in his own defense;

c. The right against self incrimination at his own trial and the right not to be compelled by the court to testify if he chooses to remain silent;

d. The right to confront and cross-examine in open court the witnesses whom the prosecution calls to testify against him;

e. The right to have his witnesses subpoenaed at the prosecution's expense to testify in his defense;

f. The right to put the prosecution to its burden of proving its case against him beyond a reasonable doubt;

g. The right to appeal the decisions of the court or the jury;

h. The right to retain his own attorney to represent him. He understands that if he cannot afford an attorney, one will be appointed to represent him upon his request if he is indigent and that he could be sentenced to jail as a result of being convicted.

6. Defendant acknowledges that he has discussed this matter with his attorney, and that he fully understands the terms of this agreement.

7. Defendant's pleas of guilty are knowingly and voluntarily made.

8. Defendant acknowledges that he knows and understands the nature and the elements of the offense to which he is entering the plea, and that said pleas are an admission of all those elements. The general facts are as follows: Defendant acknowledges that on or about the date charged, he was traveling west bound on Highway SR-40 (US-40) near mile marker 70 (approximately 15 miles west of Duchesne, UT) at 55 mph (Speed Limit was 65) and started to pass a semi tanker truck with a pup trailer and when he had reached the point of passing the pup trailer he saw a white jeep without headlights on and he turned to the left. The Jeep turned to the right and the two vehicles collided, which resulted in two fatalities. No drugs or alcohol was involved for either driver involved in the accident.

The facts of the case and the elements of the offense of Negligent Homicide are:

That on or about February 19, 2005 in Duchesne County, State of Utah, Defendant acting with criminal negligence caused the death of another.

The facts of the case and elements of the Class C offenses are:

Section 41-6a-706 (1): that on or about February 19, 2005 in Duchesne County, State of Utah, Defendant operated a vehicle to the left side of the center of the roadway in overtaking and passing another vehicle preceding the same direction when the left side was not clearly visible and not free of oncoming traffic for a sufficient distance ahead to permit overtaking and passing to be completed without interfering with the operation of any vehicle approaching from the opposite direction of any vehicle overtaken.

Section 41-6a-706 (2): that on or about February 19, 2005 in Duchesne County, State of Utah, Defendant while passing a semi truck was in passing in a lane authorized for vehicles approaching in the opposite direction and did not return to his authorized lane of travel before coming within 200 feet of the vehicle approaching from the opposite direction.

9. Defendant is not under the influence of alcohol or drugs and no one has made any promises or threats to induce him to plead guilty or no contest.

10. Defendant acknowledges that his pleas will be held in abeyance for a period of twelve (12) months, subject to certain limitations and conditions imposed by the Court; and the Court will retain jurisdiction during said Abeyance period. The terms of the agreement are as follows:

a. Defendant will pay $1,500.00 to the Duchesne County Attorney's Office for the benefit of the victims' families.

b. Defendant shall successfully complete an education and training course of at least eight hours duration on driving awareness. Defendant shall fully pay for the education course, and shall report his successful completion of the course to the clerk of court within the period his guilty plea is held in abeyance.

c. Defendant shall perform forty (40) hours of community service at a public or charitable organization.

d. Excluding non moving traffic violations, Defendant shall not violate any Utah state law or be convicted of the same, during the term of this Agreement.

e. Defendant shall appear before this Court for review whenever required by the Court. Any notices may be sent to Defendant at his residence: 2729 East 3625 South Vernal, UT 84078. Defendant shall provide to the clerk of court and to the Office of the Duchesne County Attorney any change of address or telephone number in writing, within ten days.

f. Defendant's compliance with the terms of his plea abeyance shall not be monitored by the Adult Probation and Parole Department.

11. Defendant acknowledges that if he fails to live up to all the terms of this Agreement, the Court may accept the pleas of guilty and proceed to sentence Defendant pursuant to law and the sentences may run either concurrently or consecutively.

12. Defendant acknowledges that by entering into this Agreement he knowingly waives the right to be sentenced within 30 days after the entry of the pleas.

13. Defendant acknowledges having been advised that any request to withdraw his pleas of guilty must be made by motion, and is waived if not made within 30 days after entry of the pleas.

14. The State shall make a Motion to the court to dismiss this action upon Defendant's completion of all of the conditions of this agreement, at which time the Court will allow Defendant to withdraw his guilty pleas and the Court will order dismissal of the case.

15. Defendant acknowledges that he has read this document or this document has been read to him by another person and he knows and understands its contents and he adopts each one of the statements herein as his own.

16. The parties acknowledge that the Court may enter an Order pursuant to the terms of this Agreement.

DATED this 12th day of September 2005.

KAREN ALLEN
DUCHENSE COUNTY ATTORNEY

BRANDON RAY LANE
Defendant

ROBERT P. FAUST
Attorney for Defendant

Addendum E

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Attorney for Defendant

IN THE EIGHTH DISTRICT COURT OF THE STATE OF UTAH

DUCHESNE COUNTY, DUCHESNE DEPARTMENT

STATE OF UTAH,	)	
	)	
Plaintiff,	)	ORDER
	)	
v.	)	Case No. 05-1800048
	)	
	)	
BRANDON RAY LANE	)	Judge John R. Anderson
	)	
Defendant.	)	

This matter came on for disposition hearing before the Honorable John Anderson on the 12th day of September, 2005. The State of Utah was represented through its attorney, Karen Allen, and the Defendant, Brandon Ray Lane was present and represented by counsel, Robert P. Faust. The Defendant entered guilty pleas to two counts of Negligence Homicide, a Class A Misdemeanor, pursuant to Utah Code Annotated §76-5-206 (1953) and to two Class C Misdemeanors in violation of Section 41-6a-706 (1) and violation of Section 41-6a-706 (2), as amended, and the State of Utah made a Motion that the Defendant's guilty pleas be held in

abeyance for a period of twelve 12 months. The parties stipulated to the terms and conditions of the Plea in Abeyance Agreement in open court and the written agreement has been filed with the Court. The Court finds the Defendant pleas have been knowingly and voluntarily made pursuant to the Plea in Abeyance Agreement. Based upon Defendant's pleas of guilty, the written Plea in Abeyance Agreement on file herein, and good cause appearing,

IT IS HEREBY ORDERED:

1. Defendant's pleas of guilty are received and held in abeyance for a period of 12 months.

2. The terms and conditions of said Plea in Abeyance are as follows:

a. Defendant will pay $1,500.00 to the Duchesne County Attorney's Office for the benefit of the victims' families.

b. Defendant shall successfully complete an education and training course of at least eight hours duration on driving awareness. Defendant shall fully pay for the education course, and shall report his successful completion of the course to the clerk of court within the period his guilty plea is held in abeyance.

c. Defendant shall perform forty (40) hours of community service at a public or charitable organization.

d. Excluding non moving traffic violations, Defendant shall not violate any Utah state law or be convicted of the same, during the term of this Agreement.

e. Defendant shall appear before this Court for review whenever required by the Court. Any notices may be sent to Defendant at his residence: 2729 East 3625 South Vernal, UT 84078. Defendant shall provide to the Clerk of Court and to the Office of the Duchesne County Attorney any change of address or telephone number in writing, within ten days.

f. Defendant's compliance with the terms of his plea abeyance shall not be monitored by the Adult Probation and Parole Department.

4. This Court shall retain continuing jurisdiction for the purposes of reviewing and modifying the conditions of the abeyance agreement and this Order, and in the event Defendant violates any of the terms of the agreement or this Order, the Defendant may be brought before the Court and the Court may accept Defendant's plea of guilty and impose sentence according to law.

5. Upon the Defendant completing all terms of the Plea in Abeyance Agreement to the Court's satisfaction, upon motion by the Plaintiff, the Defendant will be allowed to withdraw his guilty pleas and the Court will dismiss the case.

DATED this 17 day of Sept, 2005.

JUDGE JOHN R. .ANDERSON
District Court Judge

APPROVED AS TO FORM:

KAREN ALLEN
Attorney for Plaintiff

ROBERT P. FAUST
Attorney for Defendant

Addendum F

ORIGINAL

IN THE EIGHTH JUDICIAL DISTRICT COURT OF DUCHESNE COUNTY

DUCHESNE DEPARTMENT, STATE OF UTAH

-o0o-

STATE OF UTAH,	)	
	)	
Plaintiff,	)	**STATUS HEARING**
	)	
vs.	)	
	)	
BRANDON R. LANE,	)	Case No. 051800048
	)	
Defendant.	)	

-o0o-

Be it remembered that on the 12th day of September, 2005, the above-entitled matter came on for hearing before the Honorable John R. Anderson, sitting as Judge in the above-named Court for the purpose of this cause, and that the following proceedings were had.

-o0o-

A P P E A R A N C E S

For the State:

Karen Allen
Duchesne County Attorney
P.O. Box 409
Duchesne, Utah 84021

For the Defendant:

Robert P. Faust
Attorney at Law
4132 South 2300 East
Salt Lake City, Utah 84124

-o0o-

MELINDA ROLLINS
CERTIFIED COURT TRANSCRIBER

PROCEEDINGS

The Court: Okay. You are Brandon R. Lane?

The Defendant: Yes, sir.

The Court: What is your mailing address?

The Defendant: 2729 East 3625 South, Vernal, Utah.

The Court: Vernal?

The Defendant: Yes.

The Court: Okay. Okay. This is calendared for status. There was a first appearance hearing two weeks ago. Is this case settled or do you need - do we need to have a prelim?

Mr. Faust: No. It is settled, your Honor. We have a plea agreement here - a plea in abeyance agreement -

The Court: Okay.

Mr. Faust: - that has been viewed and signed by all parties except for the defendant himself.

The Court: Okay. Tell me what is proposed.

Mr. Faust: What's proposed, your Honor, is is that the defendant is going to plead guilty to two counts of negligent homicide, a class A misdemeanor, and two counts of a class C misdemeanor, two different sections under the traffic code violation, which I can give you if you'd like, or they're contained in the agreement. They're going to be held in abeyance for a period of twelve months. The agreement also contains the

waiver of his constitutional rights. In addition, there's going to be some other requirements upon the defendant in that he's going to pay $1500 to the Duchesne County Attorney's Office for the benefit of the victim's family. He's going to successfully complete an education and training course of at least eight hours in duration on driving awareness. He will perform forty hours of community service at a public or charitable organization. And, excluding non-moving traffic violations, he would not violate any other state law or be convicted of the same during the term of the agreement.

We've also agreed that he does not need to be monitored by Adult Probation and Parole during the time period of this agreement. And he will comply with all Court orders for appearances during that time period, at the end of which if there's no violations these matters will be dismissed.

Ms. Allen: Your Honor, as far as the $1500, I know we had talked about that, but I'd like to kind of just hit that again. I don't see any value in the $1500 at this point. I think that we ought to have some sort of a restitution statement in there, but right now the medical bills - first of all, two men lost their lives - the medical bill on the third lady is over a million dollars right now. I mean - I just don't see any point in him paying $1500. We're going to need to find out what the insurance does and then we're probably going to have to assess damages at that point and see - I believe that would have to be

dealt with separately. The lady that's got the million dollar damage, her insurance at this point has paid all but 50,000. That's still a great deal of money. So I'd like to leave the damage issue open.

The Court: Is there liability insurance on him? Is there coverage?

Mr. Faust: There is, your Honor. There's a $50,000 policy and it's all been paid out. I have what's been paid out and to whom at this point. There will be no additional funds available. In addition, Mrs. Lane, the defendant's wife, was also injured in the automobile accident. She has waived any of her rights to any of the insurance proceeds - you know - realistically a young married couple, they're in debt, they have little or no assets. This $1500 is what we were able to come up with in regards to what they could fit it in within their budget and faithfully and fully comply with.

The Court: I guess there needs to be some kind of conclusion I guess as to an agreement to be bound or some future determination. We don't have that today, I guess.

Ms. Allen: No. And I guess - we actually flew to Denver and met with the family and I believe at this point they would consider that a slap in the face more than they would what he's probably trying to do which is make an attempt at restitution.

The Court: So you don't have the case settled?

Ms. Allen: I just don't think we need $1500 in there now. I think we're going to have a ton of other money. And if they sue him civilly that's going to be involved in that.

The Court: Well, so -

Ms. Allen: So I think we are - I agree we are settled, but I guess I'm just saying I don't know why he needs to pay $1500.

The Court: Well, I think that needs to be paid to go to the plea in abeyance fee for - toward the Judge's retirement fund.

Ms. Allen: All right.

Mr. Faust: I agree, your Honor.

Ms. Allen: All right. We'll do that.

The Court: Would that make the family feel better?

Ms. Allen: I'm sure it would.

The Court: All right.

Mr. Faust: Well, we can interlineate as to where the funds are to go.

The Court: This will be twelve months?

Mr. Faust: Yes, your Honor.

The Court: Okay. Mr. Lane, you need - we need to make a record. You need to understand that you are giving up your right to have a jury trial on these facts and to have your attorney cross examine and confront the witnesses, to have the

State prove to your jury beyond a reasonable doubt that they - that you did what they allege. You could appeal if convicted. You could have some input with Mr. Faust in picking the jury of people that look good to you. You could have this done in a reasonably speedy time. You don't have to prove anything. The State has the burden of proof. I would instruct your jury that if any of them had a reasonable doubt they shouldn't vote to convict you. Those are the rights that you're giving up by entering into this plea in abeyance. Do you understand that?

The Defendant: Yes, sir.

The Court: If you should not comply with the plea in abeyance or get in some kind of serious trouble during the interim of the next year you might find yourself in here being sentenced on the two class A's and the two class C's and you didn't get to have a trial. Do you understand that?

The Defendant: Yes, sir.

The Court: It could result in a year in prison and a $2500 fine on each count. You understand that if you do what you're supposed to do that it will work to your advantage and we'll allow you to withdraw your guilty plea and the case will be dismissed. But if you don't do what you're supposed to do the consequences will be you've entered this plea and you didn't get to have a trial. Do you understand that?

The Defendant: Yes, sir.

The Court: And since it's going to be twelve months

long you need to give up your right to be sentenced within twelve months, or actually within sixty days, what we call a speedy trial right. Do you agree to that?

The Defendant: Yes, sir.

The Court: I need a factual basis, Mr. Faust.

Mr. Faust: Let's see where I can find that, your Honor.

Ms. Allen: I can do that if you'd like.

Mr. Faust: That's fine. I was just looking for the date.

Ms. Allen: I think it - was it the 19th of February?

The Court: Yes.

Ms. Allen: There were a - there were two couples in a vehicle like a Cherokee or something and they were coming like from Salt Lake to - they were going to Colorado, and Mr. Lane was in the other lane as were several - apparently several other cars and he was in a truck and there was - traffic had stacked up. And at one point he went to pass and when he passed as he got out apparently he didn't - he realized that he was going to hit this other car and so - because he couldn't get back in to the line of traffic next to the semi, and so he ended up veering to the left and the other driver veered to the right as he should have, but it - they both veered to open space and they hit each other head on. The two men in the car were in the front seat and they were both killed I believe almost immediately. Their wives were in the back seats. One of them had some things like broken arm,

broken ribs. I think she was up on her feet in a couple of months. The other lady is still in a wheelchair and is expected to be in therapy for some time. And she's the one who I told you her medical bills had run over a million dollars at this point.

The Court: So factually, do you agree with the fact that that's basically what happened?

The Defendant: Yes, sir.

Mr. Faust: In addition, just for the record, Judge, there was no alcohol or drugs involved for either driver in the accident.

The Court: Okay. You have a plea in abeyance agreement in front of you there. I'll have you sign off on that if you don't have any questions from Mr. Faust or me.

Mr. Faust: May I approach?

The Court: You may.

Ms. Allen: Your Honor, I would also like it on the record that a member of the Sheriff's Department, the Victim's Advocate, and I did go out to Denver last week where we talked to - I think we talked to all the parties and their children and the people that were concerned in it so it's - concerned with it and they had a lot of concerns at first, but I think that they are good with this agreement.

The Court: Okay. Thank you.

Okay. Mr. Lane, do you have any questions?

The Defendant: No, sir.

The Court: Okay. I'll advise you that you must file a motion to withdraw this plea within thirty days. That's not an unconditional right, but you do need to make your motion to do that.

Now you've talked about some class C misdemeanors, and I don't see an Amended Information. Are they contained in the plea in abeyance agreement?

Mr. Faust: They are, your Honor. We would consent to the amending of the Information. The sections, if you would look at paragraph 3 on page 2 of the plea, third line down. There is one violation for Section 41-6a-706(1) and one violation for 41-6a-706(2).

The Court: And substantively, what are those?

Mr. Faust: Paragraph - on page 3 in the - half way down the page the factual basis of those elements are contained right there above paragraph number 9, your Honor.

The Court: Okay. Mr. Lane, to the charge contained in the Amended Information, Count 1, Criminal Homicide, Negligent Homicide, a class A misdemeanor, on or about February 19th, 2005, what is your plea?

The Defendant: Guilty.

The Court: Count 2, Criminal Homicide, Negligent Homicide, a class A misdemeanor, on or about the same date, what is your plea?

The Defendant: Guilty.

The Court: Count 3, Violation of a Passing Lane Violation, Section 41-6a-706(1), what is your plea?

The Defendant: Guilty.

The Court: And to Count 4, a similar violation, what is your plea?

The Defendant: Guilty.

The Court: Those are class C misdemeanors.

The Court will accept the plea, find there's a factual basis, find the defendant has been advised and knowingly waived his rights. I will not enter the plea. I will approve the plea in abeyance agreement as having been made in the interest of justice. I'll enter it now and it will be in effect for twelve months. The terms of the plea in abeyance agreement will be $1500 to the - as a plea in abeyance fee, a successful completion of an education and training course of at least eight hours on driving awareness, at your own expense. Forty hours community service at a public or charitable organization. Violate no laws. I won't violate you for non-moving traffic. Report here when ordered to do so. Notify us of any change of address. Maintain compliance with the terms of the plea in abeyance. There will not be any formal probation. The Court will retain jurisdiction. If you do what you're supposed to do and complete the terms as set forth we will allow you to withdraw your guilty pleas and the case will be dismissed.

Are you going to be able to set up that $1500 on a

monthly payment plan?

The Defendant: I can probably pay it, yeah, as soon as possible.

The Court: Well, all right. I'll accept a hundred a month if you want to do it that way, either way.

The Defendant: Yeah, a hundred.

Mr. Faust: To the Court or to the County Attorney's Office?

The Court: It comes to the Court.

M

r. Faust: Okay. Thank you.

The Court: Okay. Mr. Lane, good luck. I hope you can work this out.

The Defendant: Thank you.

Mr. Faust: Thank you, your Honor.

(Whereupon the foregoing proceedings were concluded.)

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TRANSCRIBER'S CERTIFICATE

State of Utah)
: ss.
County of Uintah)

I, Melinda Rollins, Certified Court Transcriber, do hereby certify that I received the electronically recorded disc in the matter of State of Utah, Plaintiff, versus Brandon R. Lane, Defendant, and have transcribed the same into typewriting, and the foregoing pages, numbered from 1 to 11, inclusive, to the best of my ability, constitute a full, true and correct transcription, except where it is indicated the electronically recorded court proceedings were inaudible.

Witness my hand and official seal at Vernal, Uintah County, Utah, this 14th day of August, 2006.

Melinda Rollins

Melinda Rollins
Certified Court Transcriber

My commission expires:
01/26/2008

Notary Public
MELINDA ROLLINS
4393 South 2600 East
Vernal, Utah 84078
My Commission Expires
January 26, 2008
State of Utah

Addendum G

IN THE EIGHTH JUDICIAL DISTRICT COURT-DUCHESNE

IN AND FOR DUCHESNE COUNTY, STATE OF UTAH

STATE OF UTAH,

Plaintiff,

VS.

BRANDON R. LANE.

Defendant.

CASE NO. 051800048

BEFORE THE HONORABLE JOHN R. ANDERSON

EIGHTH DISTRICT COURT

DUCHESNE COUNTY COURTHOUSE

21554 WEST 9000 SOUTH

P.O. BOX 990

DUCHESNE, UTAH 84021

REPORTER'S TRANSCRIPT OF PROCEEDINGS

DEFENDANT'S MOTION TO DISMISS

AUGUST 27, 2007

TRANSCRIBED BY: Russel D. Morgan

ORIGINAL

APPEARANCES

FOR THE PLAINTIFF:

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FOR THE DEFENDANT:

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FOR VICTIMS:

HEIDI M. NESTEL
UTAH CRIME VICTIMS LEGAL CLINIC
2035 SOUTH 1300 EAST
SALT LAKE CITY, UTAH 84105

August 27, 2007. Duchesne, Utah.

PROCEEDINGS

THE COURT: Next case is Brandon Lane. State vs. Lane.

MR. FAUST: Your Honor, my name is James Faust. I am Robert's older brother.

MS. NESTEL: Your Honor, could I just introduce myself? I'm Heidi Nestel from the Victims.

THE COURT: Yes. I'm reading your letter.

MS. NESTEL: Okay.

THE COURT: When is this case calendared for argument in the appellate court?

MS. NESTEL: I called the appellate court on Friday. And it is scheduled right now for October 8th. I anticipate it will be heard in October. Unfortunately, I do have plane tickets for Germany that week. But I will be available the second week of October. I'm hoping to get it scheduled that week. But it has been calendared.

MR. FAUST: I haven't received any notification one way or the other.

THE COURT: Okay. This is Mr. Lane's motion based on the plea in abeyance for dismissal. My inclination, just thinking about it, though, would be to grant that motion but stay its execution until the appellate court makes a ruling on this. But I'll hear from you.

MR. FAUST: Yes, Your Honor. It's a very -- the success of our motion to dismiss today resolves around the court's interpretation of these two statutes, 77-2(a)-2 and 77-38-11. And does the court wish me to go in -- are you familiar with the facts or --

THE COURT: No. I have the background.

MR. FAUST: All right.

THE COURT: Give me a chance to look up the statutes though, because I want to read them. Lets see, 77-7A-2?

MR. FAUST: Yes. And 77-38-11(2)(b).

THE COURT: Maybe you can find that for me. Thank you.

MR. FAUST: The applicable part is paragraph five.

THE COURT: Very well.

MR. FAUST: Okay. Your Honor, it's our position that the victims derive their limited appellate rights from the Victims Restitution Act of 77-38-11(2)(b), which provides down here that adverse rulings on these actions or motions are requested by the victims at the time or a representative of a victim of the crime may be appealed under the rules governing the courts. And this becomes the critical section of the statute. "Provided that no appeal shall constitute grounds for delaying any criminal or juvenile proceedings." When that particular statute is then read in connection with 77-38-11(2)(b), it then indicates that pleas in abeyance may

not be -- on misdemeanors -- may not be held more than 18 months.

We believe that it is to a point where the 18 months has expired and, therefore, this court by operation of the law must dismiss the criminal complaint against Brandon Lane.

In the State vs. Casey, Justice Wilkins spoke about this limitation. This was a 2002 case, where he indicated that he recognized that there was a limited time of appeal. However, nonetheless, that there were competing rights, constitutional rights to a speedy trial, and that when viewed against the victim's rights, nonetheless, if the appellant victim fails to trial, perfect, argue and prevail in the appellate action before the proceeding below runs its course, then the appellate review is moot and the victim has no further remedy. If the court rules today that the plea in abeyance, that this court is governed by the 18 month time period for misdemeanors on a plea in abeyance, that would, in essence, make moot the appeal which is presently before the court of appeals. And then we would make a motion for a summary disposition to have it dismissed at the appellate level.

We do not believe that it tolls the statute of limitations or the abeyance period. Furthermore, the victims raise, basically, three arguments against us. One, they say, the court's order staying the plea in abeyance tolls the running of the statute of limitation period. Two, the

defendant has suffered no hardship and, three, that the statutorily allowed period for plea in abeyance is really three years as opposed to 18 months.

The governing part of the statute talks in here to any combination of misdemeanors and felonies not or felonies. And so, the three year statute of limitation only applies if there is a felony that is also being held in abeyance as well, not to just misdemeanors, the 18 months applies merely to the misdemeanor, and that's all. This court was in its power to stay the entry of the conviction. But beyond the 18 month time period, I believe that the legislature intent and that of the statute is such that it divests the court with power at that point in time and, therefore, since he has completely, fully completed -- complied with the terms of his plea in abeyance, filed an appropriate motion which the court then stayed in order to allow them to brief, nonetheless, given that remaining time period, if they don't prevail or perfect their right of appeal within that time period, then the appellate process is moot at that point in time. And the case must be dismissed. Does the court have any questions?

THE COURT: I don't believe so.

MR. FAUST: Thank you. I might mention that there has been numerous delays from the letter, the docketing statement that have been stipulated, extensions for time on at least two incidents. And so, there has been a slumbering

and a delay in the enforcement of their rights even though the 18 months time period.

THE COURT: Okay. Thank you. Miss Nestel.

MS. NESTEL: Thank you, Your Honor. It is my pleasure to be here this afternoon. I have not had the opportunity to be in Duchesne before. And just because we have not had this opportunity, I want to let you know that I am here on behalf of Patricia Hay and Peggy Hay, who are the victims in the case as well as their Kathy, the daughter of John Hay, the deceased victim. And Terry Hay, the daughter of Dan Hay, the deceased victim.

Your Honor, I appreciate defense counsel's comments. However, I think there are some problems and flaws in the arguments. First of all, to address his argument that victims don't have a right to appeal, or that if they do appeal it can not delay any proceeding. First of all, I would say to that, in this case, as opposed to the Casey case in which Judge Wilkins gives a nonbinding or noncontrolling but concurrent opinion, however, I would just further in a second, that is distinguishable from this case. There was no pending proceeding. And there is no pending proceeding that has been out there or looming that the defendant counted on or banked on that has been delayed. We address those issues right upfront once the victim's motion to dismiss was denied.

And, Your Honor, after hearing argument from defense

attorney, then Robert Faust, myself decided to stay the proceedings which, in essence, froze the case. And, in fact, the entire file has been sent to the court of appeals. And they are effectively addressing the issue now.

My other point I want to make is the appeal made by the victims is not based exclusively on 77-38. Although, we do raise issues that the rights were violated, the right to be present and heard, the victim also raise additional issues constitutional rights, issues, the right to be treated with fairness, respect and dignity, their constitutional right under Article I Section 28 subsection (2) to be present and heard at hearings. We also raised appellate claims under 77-38(a) in a totally different chapter of the statute. So, the victims' appeal is not entirely dependent on 77-38. That is one component of it, but the rights violations enumerated in our PO stem from violations of the constitutional rights, procedural rights specifically, Rule of Criminal Procedure 35 as well as right to restitution under 77-38, 38(a).

As well, I would like to address Judge Wilkins' concurring opinion. And I know this was based ad nauseam initially. And I know Your Honor has read the opinion. At first blush, I thought Justice Wilkins' opinion also was sort of a message that victims did not have a remedy. But reading it closely, and I'm sure that you have, but if not, I encourage you to do so, within the first two sentences of his opinion, he

indicated that the victims' rights were violated and the guilty pleas should have been withdrawn. That case is distinguishable from this in the sense that in the Casey case there was an impending sentencing hearing after he had pled guilty. And Justice Wilkins did point out that within the six weeks period it would be almost impossible for a victim to initiate and perfect an appeal. And we are all familiar with the length of an appellate process, which we have dealt with as well. But, in this case, we made a timely appeal.

I would like to address defense counsel's comments about the delays in the case. This case has not been unusually delayed. The issues brought to the court of appeals, most of the issues are issues of first impression. So, that there have not been a lot of precedent in which to rely upon and file arguments is required extensive research. I personally have gone to the legislature and listened to hours of committee meetings, discussions about when the Victims' Bill of Rights so that we could chart the statutory history of these different bills and present that to the court of appeals, which were included in our appellate briefs. So, there have not been unusual delays.

And, quite honestly, defense counsel had called me in April and indicated he was going to need a delay in June, and I'm sure that after reading the statute chose not to. And he did file his brief without delay.

We are scheduled, Your Honor, for argument. And this clearly is a case that the court of appeals has been willing to accept and wants to hear argument on. And that's what I would ask the court to uphold that process today so that we can get to our own argument and get a ruling from the court of appeals.

And as far as the three arguments that we have raised, Your Honor, really, the strongest one is that you stayed the plea in abeyance period.

On November 20th -- well, first of all, on August 14th when we were, when the victims had filed our motion to set aside the plea, Your Honor specifically gave an order that was signed that it would be stayed until the trial court pleadings had been filed and Your Honor had ruled. You did rule the end of the October dismissing or ruling against the victims' motion to set aside. But, in teleconference on November 20th, where all the parties were present, the issue was raised, defense counsel argued against a stay. And Your Honor, in fact, issued the stay.

Specifically, the wording from the order that you signed was, "The plea in abeyance shall remain stayed pending the filing and acceptance of an appeal. If appeal is not accepted, the stay would be removed."

The appeal was, in fact, accepted. So, really, the only fair thing at this time, Your Honor, is to uphold your

order and continue the stay until the court of appeals has addressed this.

The defendant has not in any way been disadvantaged. That was a specific safeguard we put in place. It would not have been fair if from November until March or now or whenever if he had violated an additional criminal law to then say he has violated the plea in abeyance and he doesn't get that advantage. That was recognized by the victims. It was actually our motion to bring that forward before Your Honor to say he should not be held accountable to a disadvantage. And defense counsel brought up the motion that Your Honor -- the order that Your Honor signed.

Finally, to the gist of the statute that the defense attorney has cited, I really think, Your Honor, that the argument he makes is brought in this. If you look at the language of the statute, it says, "18 months to any class of misdemeanor." That's a singular word. And it does not encompass multiple misdemeanors. When you look at what the intent of the statute is, if it is a misdemeanor, that means it was not as serious of a crime, for example, a felony or a combination of misdemeanors, hence, it should not be held for as long a period. But if you look at the statute it says, "Or any degree of felony." Right there, if it's a felony, it's automatically 36 months. It doesn't make sense that it would have to be a combination of a felony and a misdemeanor to make

it 36 months since one felony in and of itself shall be held for 36 months. So, it does make sense, it makes more sense to read it in terms that if there are any multiple misdemeanors, or it could be a combination of misdemeanors and felonies, that it's to be held for 36 months. That's what we are asking Your Honor to interpret the statute as, as well as most importantly the fact that Your Honor did stay it. That's understanding of the victims why we had proceeded and invested all the resources and time in conducting our appeal. And we hope in the interest of justice that you will uphold that stay order and we can continue with our progress at the court of appeals.

THE COURT: What are you -- you say the issues you are presenting are novel. I had a question. In this kind of a case, there is often a civil lawsuit or a civil settlement. If that were to be made, would the restitution which may be ordered be offset by any settlement that was taken in the civil case or, clearly, they wouldn't be entitled to both, would they?

MS. NESTEL: Right. And I don't think the Crime Victims Restitution Act envisions a victim being able to double dip, if you will, to receive full restitution award and then a civil judgment as well. My understanding of the case law and, typically, you get a criminal judgment first, a restitution order, and then a subsequent civil order. Anything that's been paid toward restitution, typically, is

applied to the judgment in the civil case. So, I think that's accurate that the victims would not be entitled to more than the total amount of out-of-pocket expenses, you know, unless they received a civil judgment that included punitive damages.

THE COURT: I see. Second question. I had a securities case, securities fraud case. The counsel negotiated a plea in abeyance agreement where the defendant was to pay back something like $200,000. And so, the plea in abeyance agreement from the get-go was like 18, well, let's see, it was probably about six years, I believe, so that he could amortize that out and pay these people. Well, the appellate court came down and said, no, Judge Anderson, you can't do that. It's statutory. It's jurisdictional. You can't have it in effect for more than three years. And the case was reversed. And that was it. And I have a problem with understanding how I could stay something that's jurisdictional. I mean, I already did. But, at this point, we have a new motion. I'm not sure how that would apply. Are you confident that my stay order would not prejudice the rights of the defendant if the appellate court, said "Kings X," there can't be one that extends for more than two years?

MS. NESTEL: I think because there are four misdemeanors at stake, and part of the plea in abeyance, mainly a multitude of misdemeanors, I am confident that you

are within your rights to stay the plea in abeyance agreement, especially where it's not disadvantaged the defendant. If he had been at risk or liability at this time and, in fact, maybe violated the law. I don't know. I haven't done an updated search on his criminal history. But that may pose a problem. But where there has been no risk to the defendant and where the statute does allow for a multitude of misdemeanors be held for 36 months, I am confident that Your Honor's stay is within the legal limits.

THE COURT: Okay. Thank you.

MS. NESTEL: Thank you, Your Honor.

MR. FOOTE: Your Honor, we haven't been involved very much in the sense since it was taken over by Miss Nestel. I guess my understanding, originally, what happened here, the original, just to correct, actually, Miss Nestel, it wasn't Your Honor who signed the order in August. It was judge Cornby. Judge Cornby stood in for you last August for a while. The order at that point in time stated hereby the order of plea in abeyance shall be stayed from this date until the court has decided that all relevant issues raised by the parties have been resolved. Then the court came back on the 20th of November and entered that order to stay. What seems relevant to me is that when this order was signed in August 2006, the plea in abeyance had not terminated, had not run its course yet. And the court entered an order at that

point in time staying things.

My understanding of the stay is -- (inaudible) lasts longer than 18 months. Assuming that, assuming that he were correct, (inaudible) 18 months. But when an order, something is stayed, my belief is that time is not running. And so, the 18 month time period would be while the plea in abeyance is, in effect, in effect. I believe that's how the court would hold. That while something is stayed, the time is actually not running.

THE COURT: The time is tolled.

MR. FOOTE: The time is tolled when the court stays, is how I understand it to be. Well, in this matter and other matters as well, just as if a re-stayed sentencing on appeal, their probation time and those things do not start running until they get time with the appeal and come back either for resentencing or further hearings.

THE COURT: Let's do the math on that. If the time that is running is tolled, where are we today? What was the --

MR. FOOTE: Well, my understanding, the original plea was entered on September 12th, 2005. The initial order of stay was on August 14th, 2006, eleven months later.

THE COURT: So, that was within the period.

MR. FOOTE: It was within the original 12 months. Then in November, while under Judge Cornby's order, it was

stayed. In November, then the court entered another order, in which Mr. Faust actually prepared, stating it would be stayed until the court of appeals had determined all relevant issues. I believe that the stays operate as a time stop. Just same way it does in criminal actions, appeals on first impression, whatever else, everything stops. The probation period doesn't start running. The jail period is not entered. Everything is stopped. And that's my understanding of what the stay is. And because it's stopped, the statute here regarding how long a plea in abeyance may be entered into, how long they last, the plea in abeyance is, in my opinion, because of the order of the court, not in effect at this point in time. Plea in abeyance is setting off to the side awaiting a future order from the court reinstating it or doing whatever it needs to do with it.

THE COURT: Unless it's jurisdictional.

MR. FOOTE: Maybe.

THE COURT: Mr. Faust?

MR. FAUST: Yes, Your Honor. That may be the case with cases involving things that do not derive specifically from jurisdictional or from statutory construction. However, the legislature was very clear in talking about plea in abeyance down here that nothing regarding the enforcement of appellate review, money damages, anything could not delay. So, the court could delay or stay the order for a period of

18 months. So, at 11 months, when it was stayed, that was a proper entered order. When it again entered a stay order in November, the 18 months had not yet passed, and that was still appropriate for it to stay. But, at the time that the 18 months expires, I believe that the court's ability to continue to toll and stay the order expires at that point in time because it becomes jurisdictional and, specifically, when related to the appellate rights under the Victim's Reparation Act.

In regards to the second issue raised, there has been a civil settlement. And there was a stipulation for settlement entered into which, I believe my brother argued to the court indicating that, civilly, they had already received the monies under the insurance policy and signed it, complete release, compromising the settlement. That was one of his arguments which was made subsequently.

Furthermore, my client has been inconvenienced. He completely -- completed all of the requirements requested by the court, paid the fine, attended the defensive driving course, and did all of them early and was anticipating that upon the completion of the 12 months that his plea in abeyance would then be dismissed by the court. And the only reason it got continued beyond that period of time was because of the actions filed by Miss Nestel and the Victim's Reparation after they had their opportunity to argue the

motion to set aside the plea agreement. After that was denied, then the court, I believe, still had the power to continue to stay up through 18 months. But once the 18 months had expired, then that ended the ability of them to continue their appellate review.

THE COURT: Okay. Thank you. This court, when it approves settlements, generally relies on the counsel, the adversary system to negotiate a settlement. And I think the state, county, the prosecutor has a duty, has a burden to get the approval of the victims. For one reason or another, apparently, that did not happen in this case. And I assumed that it had. I apologize to the victims that are here. They were not, certainly not shunned by me. I inquired whether they were on board. I was told they were. We approved the deal. And we went on with our business. That having been said, it appears to me, and I got my hand slapped once before on the securities case I have told you about. I haven't read the opinion recently. But it seemed to me they viewed that as jurisdictional, and that I had no power to approve a plea in abeyance agreement that extended beyond -- well, it had to extend in that case to allow the guy to pay his restitution. But they said, no, it can't exceed three years. So, on that basis, I'm going to go ahead and grant the defendant's motion to dismiss this case on jurisdictional grounds. I don't think I have the power to stay that any longer. Although, it

would be -- I would be interested in the court of appeals' decision on this case of the issues that have been raised. My understanding is they are fairly novel issues. And, Miss Nestel, maybe some day you can get them before that again. But I'm going to grant the motion to allow the defendant to withdraw his plea. And this case is dismissed.

MR. FAUST: Thank you, Your Honor.

THE COURT: Yes.

MS. NESTEL: May I ask that you have defense counsel write a written order so that that be signed? Because we anticipate an appeal.

THE COURT: Certainly. Will you prepare an order?

MR. FAUST: Yes.

THE COURT: Thank you, counsel.

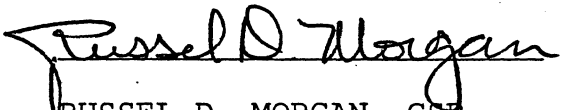
CERTIFICATE

STATE OF UTAH

COUNTY OF WASHINGTON

THIS IS TO CERTIFY THAT THE FOREGOING PROCEEDINGS WERE TAKEN BEFORE ME, RUSSEL D. MORGAN, A CERTIFIED SHORTHAND REPORTER IN AND FOR THE STATE OF UTAH, RESIDING AT WASHINGTON COUNTY, UTAH;

THAT THE PROCEEDINGS WERE TAKEN BY ME IN STENOTYPE FROM AN ELECTRONIC RECORDING, AND THEREAFTER CAUSED BY ME TO BE TRANSCRIBED INTO TYPEWRITING, AND THAT A TRUE AND CORRECT TRANSCRIPTION OF SAID TESTIMONY SO TAKEN AND TRANSCRIBED TO THE BEST OF MY ABILITY IS SET FORTH IN THE FOREGOING PAGES NUMBERED FROM 3 TO 19 INCLUSIVE.



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DECEMBER 10, 2007